Supreme Court, U.S.
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No. 05-1185

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In The
Supreme Court of the United States

ALISAL WATER CORPORATION; TORO WATER SERVICE, INC.; NORTH MONTEREY COUNTY WATER SERVICE, INC.; MOSS LANDING WATER SERVICE, INC.; ROBERT T. ADCOCK; AND NATHOLYN P. ADCOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a court lack jurisdiction where a federal agency initiates an enforcement action under the Safe Drinking Water Act without satisfying the statutory pre-condition to its right to bring the action – namely, that an appropriate state agency request federal enforcement – where precedent from this Court holds that meeting statutory prerequisites is a necessary condition of subject matter jurisdiction in environmental lawsuits, and at least one other Court of Appeals has reasoned that an agency may *not* ignore an explicit statutory requirement that a particular representative of the state request assistance before the federal agency may act?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Alisal Water Corporation, Toro Water Service, Inc., North Monterey County Water Service, Inc., Moss Landing Water Service, Inc., Robert T. Adcock, and Natholyn P. Adcock were the defendants and appellants in the courts below.

Alisal Water Corporation and Toro Water Service, Inc., are privately held corporations that have no corporate parent and issue no shares to the public. All other corporate defendants are divisions or wholly-owned subsidiaries of Alisal Water Corporation.

The United States of America was the plaintiff and appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion below is reported as *United States v. Alisal Water Corp., et al.*, 431 F.3d 643 (9th Cir. 2005). App. 1-31. The opinions of the district court are reported at 114 F.Supp.2d 927 (N.D. Cal. 2000) and 326 F.Supp.2d 1010 (N.D. Cal. 2002) and appear at App. 114-137 and App. 68-113, respectively. One memorandum decision of the district court relevant to this petition is unreported and appears in the Appendix. App. 62-67.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on October 13, 2005. App. 35. Petitioners timely filed a petition for panel rehearing. The Ninth Circuit amended its opinion and denied the petition for rehearing on December 14, 2005. App. 2. The present petition is timely under 28 U.S.C. § 2101(c) and Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Safe Drinking Water Act, 42 U.S.C. § 300g-3(b) provides:

> The Administrator [of the Environmental Protection Agency] may bring a civil action in the appropriate United States district court to require

compliance with any applicable requirement with an order issued under subsection (g) of this section, or with any schedule or other requirement imposed pursuant to a variance or exemption granted under section 300g-4 or 300g-5 of this title if –

(1) authorized under paragraph (1) or (2) of subsection (a) of this section, or

(2) if requested by (A) the chief executive officer of the State in which is located the public water system which is not in compliance with such regulation or requirement, or (B) the agency of such State which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations or State drinking water regulations.

The court may enter, in an action brought under this subsection, such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies; and, if the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of not to exceed $25,000 for each day in which such violation occurs.

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

INTRODUCTION

This petition raises a substantial question concerning the District Court's jurisdiction to hear this action. In conflict with Supreme Court precedent and the reasoning of a decision from the Court of Appeals for the District of Columbia, the Court of Appeals for the Ninth Circuit held that the statutory condition for the United States to bring an enforcement action under the Safe Drinking Water Act – that the proper state official request such action – is not jurisdictional. Although Congress imposed this condition to limit federal authority in this area of traditional state regulation and enforcement, the Court of Appeals' holding undermines Congress' scheme to ensure a strong role for state enforcement of the Act. This Court should grant this petition to clarify whether the statutory condition is a jurisdictional prerequisite.

STATEMENT OF FACTS

The Adcock family has owned and operated public water utilities in Monterey County, California, for more than 70 years. Eight of the systems are wholly owned subsidiaries or divisions of Alisal Water Corporation

("Alisal"), and one, Toro Water Service, Inc., is held independently of Alisal. App. 3. Robert T. Adcock and Natholyn P. ("Patricia") Adcock are the principal shareholders of Alisal and Toro. App. 3. In 2001, the Adcocks' water utilities served a total of approximately 28,000 people, with the largest, the Salinas Division, supplying water for about 25,000 people. App 3, n. 1. Each of the systems is regulated by the California Public Utilities Commission. Excerpt of Record ("ER") 4454.

On August 15, 1996, David Spath, Chief of the Division of Drinking Water and Environmental Management in the California Department of Health Services, sent a letter to EPA requesting EPA to bring an enforcement action against Alisal. App. 4. The United States commenced this action in January 1997 against Alisal, two of Alisal's divisions (North Monterey County Water Service, Inc. (a/k/a Normco) and Moss Landing Water Service), Toro, and Alisal's and Toro's owners, the Adcocks (collectively "petitioners"), alleging violations of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq.* and its regulations.[1] App. 4.

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[1] The first eight causes of action alleged violations of total coliform regulations on 22 separate occasions between 1991 and 1994, resulting in 193 violations of the Act and its regulations. These violations included failure to comply with maximum contaminant level ("MCL") standard for total coliform, failure to notify the state or county of the MCL exceedances, failure to give public notice of MCL exceedances, failure to do increased and routine monitoring after an MCL exceedance, failure to report the failure to do repeat monitoring, failure to report or falsified test reports of monitoring, failure to sample according to a written sample testing plan, and failure to keep proper records of samples. *See* App. 118, 120. The ninth cause of action alleged 24 violations of monitoring and reporting requirements for lead and copper at several small water systems in 1993 and 1994. *See* App. 118; *see also*

(Continued on following page)

In August 2000, the District Court granted summary judgment against all defendants on the first nine causes of action. *United States v. Alisal Water Corp.*, 114 F.Supp.2d 927, 932-36 (N.D. Cal. 2000) ("*Alisal I*"). App. 114-137. After a trial, the District Court ruled for the government on the tenth cause of action for fraudulent conveyance. App. 4. The Court subsequently granted summary judgment against the corporate defendants (but not the Adcocks) on causes of action 11-13. App. 5.

After holding remedy hearings in December 2001 and January 2002, the Court ordered appointment of a receiver to manage the small water systems and make a recommendation regarding their sale. *United States v. Alisal Water Corp.*, 326 F.Supp.2d 1010 (N.D. Cal. 2002) ("*Alisal II*"); *see* App. 5, 68-113. The Court allowed the Adcocks to continue to manage the Salinas Division (the largest water system), but also required them to implement millions of dollars of improvements. App. 111. The Court subsequently held two "town meetings" in August and December 2003, at which it solicited public comment about possible sales of the small water systems. *See* App. 21-22. On April 13, 2004, the District Court ordered the receiver "to conclude the sales of the systems [to the designated entities] as soon as practicable." *See* App. 5-6.

The government asked the Court to impose a penalty in the range of $3-5 million and urged the Court, if the individual petitioners could not pay the penalty after liquidating all their assets, to order petitioners to

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ER3450-ER3457. The 10th cause of action alleged fraudulent conveyance of assets. App. 118. The 11th through 13th causes of action alleged eight MCL violations for total coliform at three water systems between August 2000 and March 2001. ER743.

purchase a small annuity for their subsistence for their estimated life-expectancy. ER4412-ER4420. On May 20, 2004, the Court assessed a civil penalty in the amount of $500,000, but allowed a credit of $300,000 to take account of the fact that some of the sales were being made to the lowest bidders, rather than to the highest bidders who submitted bids to the receiver. App. 6.

Petitioners raised several issues on appeal, including whether the District Court had jurisdiction over this action. The Ninth Circuit affirmed the District Court judgment in its entirety. Regarding the jurisdictional issue, the Court of Appeals held that the District Court had general federal question jurisdiction under 28 U.S.C. § 1331 as well as jurisdiction to hear suits brought by the United States under 28 U.S.C. § 1345. App. 6-10. The Court further held that the condition in 42 U.S.C. § 300g-3(b)(2) – requiring an appropriate state official to request federal enforcement – did not create an exception to or limit the District Court's jurisdictional authority under §§ 1331 and 1345. Rather, it

> reflects only the limitations on the government's authority to bring this suit. The statute states that the federal government "may bring a civil action" in district court "if" so requested . . . , 42 U.S.C. § 300g-3(b)(2); it says nothing to limit the district court's jurisdiction over such an action if the government was not acting pursuant to an authorized request from the state. We will not assume that Congress intended to deprive the court of subject matter jurisdiction over enforcement of federal laws where Congress has refrained from doing so and where there is no evidence of such intent. Because the SDWA includes no special provision limiting jurisdiction

> over federal question claims or suits brought by the United States, we conclude that the district court had subject matter jurisdiction over this suit and that federal jurisdiction to permit EPA enforcement under the SDWA's statutory scheme is concurrent with that of state regulators.

App. 9-10.

In response to appellants' motion for reconsideration, the Court of Appeals added a footnote stating that "the district properly concluded that the [Spath] letter was a specific request by the appropriate state agency sufficient for the EPA to bring an action. Appellant's contention that the letter was insufficient for subject matter jurisdiction under § 300g-3(b)(2) is without merit." App. 10, n. 2.

REASONS FOR GRANTING THE PETITION

A. The Condition In 42 U.S.C. § 300g-3(b), Requiring The Proper State Official To Request Federal Enforcement Before EPA May Bring An Enforcement Action, Is Jurisdictional.

EPA may bring a civil enforcement action under the SDWA "if requested" by "the chief executive officer of the State" or "the agency of such State which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations or State drinking water regulations." 42 U.S.C. § 300g-3(b)(2).[2]

[2] EPA also may bring a civil enforcement action if it first gives notice of non-compliance and offers technical assistance. *See* §§ 300g-3(b)(1), 300g-3(a)(1). Because EPA did not give notice and technical assistance before bringing this action, these provisions are not relevant to this petition except as they illustrate Congress' intention to limit

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Congress thus structured the SDWA to compel federal enforcers to respect state autonomy in this area of traditional state regulation and enforcement by requiring the proper state authority first to request federal enforcement.

As this case illustrates, requesting federal enforcement cedes important state regulatory authority to the federal executive and judiciary, including decisions to impose substantial civil penalties on a state utility and its owners, order far-reaching and expensive remedial measures, and even require the sale of a public utility to third parties recommended by the federal receiver and selected by the federal court. When a state official cedes state enforcement authority to the federal government, the state inevitably surrenders important prerogatives, spelled out in state law and carefully preserved in federal law, to regulate local drinking water systems.

The Ninth Circuit held that the District Court properly entertained this action under its "general" jurisdiction over federal questions pursuant to 28 U.S.C. § 1331 and its jurisdiction to hear suits brought by federal agencies under 28 U.S.C. § 1345. App. 6-10. The Court of Appeals construed the prerequisites of § 300g-3(b)(2) as mere "limitations on the government's authority to bring this suit" that do not divest the District Court of general

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federal jurisdiction over federal enforcement actions. EPA's implementing regulations state that "[t]he Administrator *shall notify* a State and the appropriate supplier of water" if it finds that a water supplier is not in compliance, and shall "provide advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance by the earliest feasible time." 42 C.F.R. § 142.30 emphasis added. In other words, the agency's own regulatory interpretation of §300g-3(b) requires it to give state authorities an opportunity to act before bringing a federal enforcement action.

jurisdiction. App. 9. This conclusion conflicts with Supreme Court precedent and with the reasoning of precedent from the Court of Appeals for the District of Columbia Circuit.

In *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), the plaintiff sought to bring an enforcement action under the citizen-suit provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, without first satisfying the 60-day notice requirement in § 6972(b)(1).[3] The Supreme Court held that the 60-day notice requirement was an express prerequisite to any citizen cause of action under the statute, and that the district court erred in entertaining the suit. Although the *Hallstrom* court declined to decide whether or not the 60-day notice provision of RCRA and other environmental statutes "is jurisdictional in the strict sense of the term" (*id.* at 31), lower courts, including the Ninth Circuit, have unanimously assumed that failure to give timely notice constitutes a jurisdictional bar on suit – a bar that may therefore be raised at any point in the litigation. *E.g. Covington v. Jefferson County*, 358 F.3d 626, 636 (9th Cir. 2004).

The statutory limitations on citizen enforcement suits preclude reliance on ~~28 U.S.C.~~ § 1331 to establish jurisdiction. In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-21 (1981), this Court held that the comprehensive enforcement provisions in the Clean Water Act, including the citizen suit provisions,

[3] The 60-day notice provision exists in virtually every federal environmental statute, including the Safe Drinking Water Act. *See* 42 U.S.C. § 300j-8(b)(1)(A).

preclude private suits brought under either 28 U.S.C. § 1331 or 42 U.S.C. § 1983 for violations of the Act. That is, the District Court's jurisdiction is limited by the particular prerequisites (if any) set forth in the statute under which the suit is brought.[4] As this Court put it, "'it is an elementary canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Id.* at 14-15, *quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

Indeed, the Ninth Circuit itself has previously recognized that 28 U.S.C. § 1331 is an inappropriate basis for asserting subject matter jurisdiction in a Clean Water Act case. In *City of Las Vegas, Nevada v. Clark County, Nevada*, 755 F.2d 697 (9th Cir. 1985), the Ninth Circuit held that a city challenging a consent decree in a Clean Water Act (CWA) case could not invoke the district court's "general" federal jurisdiction to state a claim under the CWA. As the court put it:

> The Supreme Court in *Middlesex* . . . , concluded that Congress intended to limit access to federal court to enforce the CWA to the express enforcement provisions of the Act. This precludes suits brought under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Las Vegas [the plaintiff] is limited to a cause of action brought under, and conforming to

[4] Congress, of course, has authority to define the subject matter jurisdiction of the lower federal courts. *Finley v. United States*, 490 U.S. 545, 548 (1989). Once Congress has drawn the jurisdictional lines, "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (*quoting Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978)).

> the requirements of, CWA § 505 [the CWA citizen-suit provisions].

Id. at 703 emphasis added.

Nor did the District Court have jurisdiction under 28 U.S.C. § 1345. That section provides that a district court has general jurisdiction over federal questions *"[e]xcept as otherwise provided by an Act of Congress."* Emphasis added. In this instance, Congress *has* provided otherwise by expressly limiting the circumstance under which EPA may bring a lawsuit under the SDWA. EPA may bring an enforcement action only

> *if* –
>
> (1) authorized under paragraph (1) or (2) of subsection (a) of this section, or
>
> (2) *if requested by* (A) *the chief executive officer of the State* in which is located the public water system which is not in compliance with such regulation or requirement, or (B) *the agency of such State* which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations or State drinking water regulations.

42 U.S.C. § 300g-3(b), emphasis added.

Just as a district court has no jurisdiction to hear an SDWA citizen enforcement action unless the plaintiff has satisfied the statutory prerequisites for such a suit (*see, e.g.*, 42 U.S.C. § 300j-8(b)(1)(A) (60-day notice)), it has no jurisdiction to hear an EPA enforcement action unless EPA has met the statutory criteria to make itself a plaintiff. There is no distinction, for jurisdictional purposes, between a citizen-plaintiff's failure to satisfy the statutory

prerequisites to bring an enforcement suit under an environmental statute, and EPA's failure to meet the prerequisites to bring its own enforcement suit. In both instances, Congress has set limitations on enforcement suits in order to ensure that other important considerations are protected.

The decision below also undermines important prudential and constitutional considerations implicit in § 300g-3(b)(2). Because of the states' traditional authority to regulate both utilities and drinking water safety, Congress strictly circumscribed the circumstances under which federal enforcers may intervene – *i.e.*, when the state government has, after notice, failed to remediate an identified problem (42 U.S.C. § 300g-3(b)(1)), or when the state government has expressly and properly requested EPA's assistance (42 U.S.C. § 300g-3(b)(2)). By holding that EPA may bring a lawsuit *notwithstanding* its failure to meet the statutory preconditions for such a suit, the Ninth Circuit ignored the congressional scheme.

The Ninth Circuit's holding, if allowed to stand, would encourage EPA in future cases to disregard the restrictions set forth in § 300g-3(b)(1) and § 300g-3(b)(2). If EPA may invoke § 1331 or § 1345 to establish federal jurisdiction to bring an SDWA enforcement action, it need never wait for the state's request, and Congress' careful delineation of the circumstances under which EPA may bring an SDWA action would be rendered meaningless.

There is an incoherency at the heart of the Ninth Circuit's analysis. The court below acknowledged that Congress specifically intended that there should be "limitations on the government's authority to bring . . . suit" under the SDWA, but it also held that those explicit

limitations have no bearing on the District Court's authority to hear the suit. App. 9. As the Court of Appeals for the District of Columbia Circuit explained in a case raising similar issues, ignoring statutory restrictions on an agency's ability to commence regulatory action or bring suit is inconsistent with Congressional intent because "we see no reason to be at all skeptical that Congress meant what it said." *Harbor Gateway Commercial Property Owners' Ass'n v. EPA*, 167 F.3d 602, 606 (D.C. Cir. 1999).

Indeed, the decision below directly conflicts with the reasoning of the *Harbor Gateway* decision. In that case, the plaintiffs/petitioners challenged EPA's decision to add a site in Los Angeles to the National Priorities List under Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-297 to 299 (1996) provided that EPA could not act "unless the Administrator receives a written request to propose for listing or to list a facility from the Governor of the State in which the facility is located." *Id.* at 604. The deputy director of the California Department of Toxic Substances Control sent a letter to EPA stating that the Department, "on behalf of the Wilson Administration [the California governor at the time], concurs with your agency's proposal to list the Del Amo Superfund site on the National Priority [*sic*] List." The Court of Appeals held the letter inadequate under the statute, thereby rendering EPA's proposal "null and void." *Id.* at 607. The court recognized that "[w]hether or not EPA officials actually considered themselves to be in compliance with the Appropriations Act" was irrelevant because "[w]e refuse to ignore the plain language of the Act in order to avoid potential costs which would not have

arisen had EPA complied with the statute's language in the first instance." *Id.* at 606.

Similarly, EPA here cannot avoid the statutory limitations imposed by the relevant statute. Where Congress has specifically limited the circumstances under which an agency may act, it is inconsistent with congressional intent to allow a District Court to assume jurisdiction where the agency has not followed the congressionally mandated procedures.

B. The Spath Letter Did Not Meet The Requirements Of 42 U.S.C. § 300g-3(b)(2).

The government contended below that it properly followed the statutorily required steps in this case because a 1996 letter from David Spath, the Chief of the Division of Drinking Water and Environmental Management at the California Department of Health Services, asked EPA to initiate this federal enforcement action. App. 4. Spath, however, did not have authority under state law to ask EPA to bring this action. Because EPA brought this action without first complying with § 300g-3(b)(2), the District Court did not have subject matter jurisdiction.[5]

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[5] In its initial opinion, the Ninth Circuit held that petitioners had waived their right to attack the statutory basis for the EPA's lawsuit because, as a non-jurisdictional limitation, the argument regarding EPA's right to bring the lawsuit should have been raised by a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6). App. 40, n. 2. After petitioners pointed out in their petition for rehearing that they *had*, in fact, raised this issue in the District Court, the Ninth Circuit amended its opinion to state that the District Court had "properly concluded" that the letter was sufficient under the statute. See App. 10, n. 2. For the reasons described in the text, the District Court's bare assertions on this matter (App. 66, 121-123) are plainly incorrect.

Under California law, regulatory authority over compliance with drinking water regulations is assigned to the Department of Health Services. *See* Cal. Health and Safety Code § 116325. No statute delegates the authority of the Director of Health Services to the Chief of the Division of Drinking Water and Environmental Management (*i.e.*, David Spath). It is equally undisputed that the Director has not delegated any of his or her authority to the Chief of that Division.

The California Supreme Court has made clear that delegation of discretionary authority may not be implied under California law. *See California School Employees Ass'n v. Personnel Commission*, 3 Cal.3d 139, 144 (1970) ("As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization"); *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22, 24-25 (1976) (absent statutory authority, a city council may not delegate its statutory responsibility to set employees' salaries); *Webster v. Board of Education*, 140 Cal. 331, 332 (1903) (absent statutory authority, a school board member may not delegate his or her duties to a deputy); *Civil Service Ass'n v. Redevelopment Agency*, 166 Cal.App.3d 1222, 1225-26 (1985) (vacating a dismissal decision because the deputy executive director did not have express statutory authority to conduct a hearing resulting in dismissal). If a lower-level official exercises authority that was not properly delegated, the official's action is void. *Civil Service Ass'n*, 166 Cal.App.3d at 1227.

Thus, Spath had no statutory or delegated authority to request federal enforcement. Once Congress has said

that a particular state official must request federal assistance before a federal agency may bring suit, the question whether the proper official has made such a request is a matter to be determined under state law. The District Court ignored the California policy requiring specific, statutory delegation of authority before the state could cede its discretionary powers in this instance.

The Spath letter did not satisfy requirement in § 300g-3(b)(2) that the Environmental Protection Agency first receive a request from "the agency of such State which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations or State drinking water regulations." Accordingly, the District Court was without subject matter jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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and Natholyn P. Adcock

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALISAL WATER CORPORATION; TORO WATER SERVICE, INC.; NORTH MONTEREY COUNTY WATER SERVICE, INC.; MOSS LANDING WATER SERVICE, INC.; NATHOLYN P. ADCOCK; ROBERT T. ADCOCK,
Defendants-Appellants.

No. 02-15907
D.C. No. CV-97-20099-JF

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALISAL WATER CORPORATION; TORO WATER SERVICE, INC.; ROBERT T. ADCOCK; NORTH MONTEREY COUNTY WATER SERVICE, INC.; MOSS LANDING WATER SERVICE, INC.; NATHOLYN P. ADCOCK,
Defendants-Appellants,
and
PATRICIA ADCOCK; BRUCE PIERSON; DAVID M. SIMCHO,
Defendants,

JOHN W. RICHARDSON,
Receiver.

No. 04-16210
D.C. No. CV-97-20099-JF

ORDER AMENDING OPINION AND DENYING PETITION FOR PANEL REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Jeremy Fogel, District Judge, Presiding

Argued and Submitted
June 13, 2005 – San Francisco, California

Opinion Filed October 13, 2005
Amended December 14, 2005.

Before: Richard C. Tallman, Jay S. Bybee, and
Carlos T. Bea, Circuit Judges

Opinion by Judge Tallman

COUNSEL

Marc P. Fairman, San Francisco, California, for the defendants-appellants.

Lori Jonas, Department of Justice, Washington, D.C., for the plaintiff-appellee.

ORDER

The Opinion filed on October 13, 2005, slip opinion at 14045, is amended by the opinion filed concurrently with this order. With these amendments, the panel has voted to deny the petition for panel rehearing.

The petition for panel rehearing is DENIED. No further petitions for panel rehearing or petitions for rehearing en banc will be entertained.

OPINION

TALLMAN, Circuit Judge:

Appellants Robert and Natholyn Adcock and various private water systems they owned and operated in Monterey

County, California, violated various public health and safety regulations under the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j. They appeal the district court's orders requiring divestiture of all except the largest water system and imposing financial penalties. We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(2) and affirm.

I

Prior to this litigation, the Adcock family water system business was organized into four corporations. The largest, Alisal Water Corporation ("Alisal"), owned and operated several public water systems, some of which are named as defendants: Alco Water Service ("Alco"), Salinas Division, Blackie Road Water System # 18, Pine Canyon Division of Alco Water Service, Buena Vista Water System, Wildwood Water System, San Jerardo Water System, Vierra Canyon Water System, Vierra Estates Water System, and Langley/Valle Pacifico Water System. Alisal also wholly owned two subsidiary corporations: Moss Landing Harbor District, which operated the Moss Landing public water system, and North Monterey County Water Service, Inc. ("NORMCO"), which operated NORMCO public water system. The Adcocks held 82.5 percent ownership in Alisal. The fourth corporation was Toro Water Service ("Toro"), which owned and operated a public water system of the same name and was wholly owned by the Adcocks.[1]

[1] Appellants represent that, as of 2001, these water systems collectively served approximately 28,000 people, of which Alco served the majority, approximately 25,000 people. The other systems served

(Continued on following page)

The United States commenced this civil enforcement action in January 1997 on behalf of the United States Environmental Protection Agency ("EPA") against the Appellants. Numerous violations of SDWA regulations were asserted, including exceeding total coliform Maximum Contaminant Levels ("MCL"), failing to monitor for lead and copper, failing to take required monitoring samples, failing to give required agency and public notices, failing to report and falsifying monitoring reports, and failing to keep proper records. The action was initiated in response to an August 1996 written request from Dr. David Spath, Chief of the Division of Drinking Water and Environmental Management, California Department of Health Services ("DHS"). Twelve counts of multiple regulatory violations (totaling 232 violations) and one count of fraudulent conveyance were alleged.

The district court granted summary judgment to the government on the first nine counts in August 2000. *See United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 939 (N.D. Cal. 2000) ("*Alisal I*"). After trial, the district court again ruled for the government on the tenth count (fraudulent conveyance). In November 2002, the district court granted summary judgment against the corporate defendants, but not against Robert and Patricia Adcock individually, on the remaining three counts, eleven to thirteen. As to the regulatory violations, the Appellants

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significantly fewer people: Blackie Road Water System (66), San Jerardo Water System (194), Vierra Canyon Water System (150), Langley/Valle Pacifico Water System (95), Buena Vista Water System (528), Moss Landing Harbor District (550), NORMCO (682), and Toro (1100). Alisal has restructured since the onset of this civil action and Wildwood Water System and the Pine Canyon Division were reorganized into the other divisions.

challenge on appeal only the partial summary judgment on counts eleven and twelve against Moss Landing and Vierra Canyon.

The district court found that the proliferation of small water systems had stretched the Adcocks beyond their ability to manage effectively and remedy the continuing health violations, endangering their customers. To remedy the underlying violations the district court initially ordered that all of the smaller water systems, including NORMCO and Toro (collectively the "Small Utilities"), be placed in receivership and directed the receiver to investigate and make recommendations about selling the Small Utilities. *See United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1010, 1028-32 (N.D. Cal. 2002) ("*Alisal II*"). The Adcocks were permitted to remain in control of only the largest individual water system, Alco, and they were ordered to implement substantial improvements that had been recommended in a previously compiled consultant's report and to allow monitoring by the receiver. *Id.* at 1030-31. The district court denied the Appellants' motion to stay the order, and a prior panel of our court affirmed the denial of a stay. During this time, the district court held extensive formal hearings regarding the Appellants' stewardship and their course of dealings with federal and state health officials. *See id.* at 1019-22 (summarizing findings). The district court also held two public meetings (in August and December 2003), where utility customers were allowed to speak about their concerns, and the judge invited the public to send written suggestions.

In November 2003, the receiver filed his report and the district court subsequently adopted the recommended sale of the Small Utilities. The court ordered that most of the systems be sold to the highest bidders, but ordered

three of the systems to be sold to a non-profit public entity, the Pajaro/Sunny Mesa Community Services District ("PSMCSD"). *See United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1032, 1038-39 (N.D. Cal. 2004) ("*Alisal III*"). PSMCSD did not have the highest bid, but the district court found that sale to PSMCSD would best serve the public interest. *Id.* at 1037 n.6. The district court denied the Appellants' motion to stay the sale order, and we affirmed the denial of a stay.

The district court also imposed monetary penalties against the Appellants. For purposes of determining the appropriate penalty amount, the district court appointed accountant Richard Pierotti to assess the liquidation value of all of the water utilities and the Adcocks' personal assets. The Appellants hired Dr. Joel Berk to review Pierotti's valuation methodology; Dr. Berk concluded that Alco was of substantially less value than Pierotti had found. The district court struck Dr. Berk's report as cumulative to evidence previously introduced by the Appellants. *Id.* at 1037-38. The district court imposed a penalty of $500,000, but then credited the Appellants $300,000 as an offset for the shortfall from not accepting all of the high bids on the sale of the Small Utilities, leaving a $200,000 total penalty due. *Id.* at 1038-39. The Appellants challenge the order appointing a receiver (No. 02-15907) and the order authorizing sale of the utilities and imposing penalties (No. 04-16210).

II

The Appellants also challenge the district court's jurisdiction over this entire eight-year litigation. They assert for the first time on appeal that the district court

lacked subject matter jurisdiction because the controlling statute states that a federal EPA enforcement action must be requested by "the chief executive officer of the State" or "agency of [the] State which has jurisdiction over compliance by public water systems." 42 U.S.C. § 300g-3(b)(2). They challenge as legally insufficient Dr. Spath's request letter to demonstrate that the proper state agency requested EPA enforcement because: (1) Dr. Spath is not the head of the DHS, which they assert is the agency with primary jurisdiction over public water systems; and (2) there is nothing in the record establishing that DHS delegated such authority to him. *See* Cal. Health & Safety Code § 116325 (granting DHS the authority to enforce state drinking water regulations).

"The existence of subject matter jurisdiction is a question of law reviewed de novo." *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 833 (9th Cir. 2004). "[District courts] are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2616, (June 23, 2005) (internal quotation marks and citation omitted). As a general matter, federal courts have subject matter jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." *See* 28 U.S.C. § 1331. By this principle, suits seeking compliance with, or remedies for, violations of federal water quality statutes and regulations present federal questions. *Cf. Chasse v. Chasen*, 595 F.2d 59, 61 (1st Cir. 1979) (citation omitted) ("It is beyond dispute that validly issued administrative regulations . . . may be treated as 'laws of the United States' under § 1331(a).").

This general grant of federal question jurisdiction is not limitless – Congress may negate district court jurisdiction "[b]y virtue of . . . a specific reference or assignment." *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *see, e.g., Staacke v. United States Sec'y of Labor*, 841 F.2d 278, 280 (9th Cir. 1988) ("[F]ederal question jurisdiction [is] subject . . . to preclusion-of-review statutes created or retained by Congress.") (internal quotation marks and citation omitted); *La Voz Radio de la Communidad v. FCC*, 223 F.3d 313, 319 (6th Cir. 2000). However, absent statutory direction to the contrary, a district court validly exercises its jurisdiction over actions "arising under" federal laws.

In addition to general federal question jurisdiction, "district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress," except as otherwise provided by Congress. 28 U.S.C. § 1345. Any exception to the general rule of § 1345 must be clear. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808-09 (1976) ("When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation.") (quoting *Rosecrans v. United States*, 165 U.S. 257, 262 (1897)).

Therefore, under either 28 U.S.C. § 1331 or § 1345, the inquiry here rests on whether the SDWA contains any special limits or exceptions to the district court's general statutory subject matter jurisdiction. Various provisions reflect congressional intent to confer subject matter jurisdiction over SDWA actions to federal district courts. *See, e.g.*, 42 U.S.C. § 300g-3(b) (granting the government

authority to "bring a civil action in the appropriate United States district court" to enforce compliance with agency orders); § 300j-7(a)(2) (requiring a petitioner to file a petition for review of agency action "in the circuit in which the petitioner resides or transacts business which is directly affected by the action"); § 300j-8(a) (granting district courts jurisdiction over qualified citizen's civil actions). Indeed, "[w]henever any civil penalty sought by the [government] . . . for a violation of an applicable requirement exceeds $25,000," as in the case at bar, the government is statutorily required to bring a civil action in "the appropriate United States district court." *Id.* § 300g-3(g)(3)(C).

The SDWA statutory scheme also creates certain narrow exceptions to the district court's jurisdiction, *see, e.g., id.* §§ 300g-1(b)(1)(B)(i)(III) & 300h-2(c)(7), but there is no express statutory negation of the district court's federal question jurisdiction over enforcement of the SDWA under 42 U.S.C. § 300g-3(b), the provision at issue here. Congress's express identification of particular aspects of SDWA litigation and agency action that are not subject to judicial review demonstrates that Congress was well aware of its power to limit the scope of the district court's subject matter jurisdiction over certain SDWA claims.

The Appellants argue that 42 U.S.C. § 300g-3(b)(2) divests the district court of jurisdiction, but we disagree. Rather than creating a special exception to the district court's jurisdictional authority to hear this suit, the statute reflects only the limitations on the government's authority to bring this suit. The statute states that the federal government "may bring a civil action" in district court "if" so requested (or if authorized under conditions

not relevant here), 42 U.S.C. § 300g 3(b)(2); it says nothing to limit the district court's jurisdiction over such an action if the government was not acting pursuant to an authorized request from the state.[2] We will not assume that Congress intended to deprive the court of subject matter jurisdiction over enforcement of federal laws where Congress has refrained from doing so and where there is no evidence of such intent. Because the SDWA includes no special provision limiting jurisdiction over federal question claims or suits brought by the United States, we conclude that the district court had subject matter jurisdiction over this suit and that federal jurisdiction to permit EPA enforcement under the SDWA statutory scheme is concurrent with that of state regulators.

III

On appeal, the Appellants concede that they committed the majority of the SDWA regulatory violations found by the district court and challenge the adverse summary judgment only on counts eleven and twelve against Moss Landing and Vierra Canyon. The government demonstrated that Moss Landing and Vierra Canyon committed eight violations of total coliform MCL regulations in 2000 and 2001. The Appellants argue that judgment was impermissibly based on "special" samples taken by the Appellants to investigate anomalous results provided by

[2] The Appellants contend that Dr. Spath's request letter was insufficient to grant enforcement power to the federal government. However, the district court properly concluded that the letter was a specific request by the appropriate state agency sufficient for the EPA to bring an action. The Appellants' contention that the letter was insufficient for subject matter jurisdiction under § 300g-3(b) is without merit.

the state. The district court found that the samples were "routine" and that the only thing that made these samples "special" was that the Appellants labeled them as such.

"We review the grant of summary judgment de novo." *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). The question we must answer is whether the government demonstrated through appropriate means that these water systems violated total coliform MCLs. By regulation, a water system which collects fewer than 40 samples per month in accordance with its routine monitoring program is in compliance with total coliform MCL if no more than five percent of samples in a given month are total coliform-positive. 40 C.F.R. § 141.63(a)(1). A total coliform MCL violation is based on "routine" and "repeat" samples, *id.* § 141.21(a)(5)-(6), (b)(7), and may not be based on samples that have been invalidated, § 141.21(c), or on "[s]pecial purpose samples," § 141.21(a)(6).

The regulation details the requirements for a "routine monitoring plan," which requires collection of "total coliform samples at sites which are representative of water throughout the distribution system according to a written sample siting plan." *Id.* § 141.21(a). But the regulation does not expressly define "routine samples" for purposes of establishing a violation. The Appellants interpret 40 C.F.R. § 141.21 as requiring that only samples taken as part of a routine monitoring plan be considered "routine." The government acknowledges that only "routine" and "repeat" samples may be relied upon, and that the samples at issue here were not "repeat" samples or taken as part of a routine monitoring plan. However, the government asserts, and the district court concluded, that "routine" samples are any samples which are not "special" under the regulation and are representative of water

throughout the system. Therefore, the operative question is what constitutes a "routine" sample.

An agency is entitled to interpret its own regulation and "ordinarily its construction will be affirmed if it is not clearly erroneous or inconsistent with the regulation." *Pac. Coast Med. Enters. v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980) (citations omitted). However, because neither party introduced evidence of an official agency definition of a "routine" sample for purposes of establishing a violation under the regulation, we do not necessarily defer to the government's position. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (noting that deference does not extend to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). Such deference may still be appropriate, however, when there is "no reason to suspect" that an agency interpretation introduced only through a legal brief "does not reflect the agency's fair and considered judgment on the matter." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

We need not decide precisely how much deference the EPA is due here because we conclude that the only reasonable interpretation of 40 C.F.R. § 141.21(a) is the one espoused by the government; we therefore agree that any sample that is representative of water throughout the system and not a "special purpose sample" or otherwise invalidated is "routine" and may suffice to establish a regulatory violation. The Appellants' interpretation of the regulation is untenable. Precluding reliance on accurate water quality samples simply because they were not taken according to a preset plan would prevent the government from identifying and remedying total coliform MCL violations in a variety of contexts, such as where the water utility itself submitted only negative samples under its

routine monitoring schedule. This effectively could insulate a violator from judgment in cases where the water utility purposefully conceals excessive coliform test results in its routine monitoring plan reporting or fails to keep accurate records of testing, as the Appellants did here. *See Alisal I*, 114 F. Supp. 2d at 934. Interpreting the regulation to allow reliance on only samples submitted under a routine monitoring plan would clearly undermine the effectiveness of the reporting requirements and threaten public health and safety, and so we reject this unreasonable interpretation of the statute. *Cf. SEC v. Edwards*, 540 U.S. 389, 395 (2004) (addressing securities law and declaring that the "[Supreme] Court will not read into the . . . laws a limitation not compelled by the language that would so undermine the laws' purposes.").

Moreover, our interpretation is consistent with the overall regulatory scheme. When interpreting a regulation, we must avoid an interpretation that would render another regulation superfluous. *See, e.g., Dodd v. United States*, 125 S.Ct. 2478, 2490 (2005) (Stevens, J., dissenting). As noted, the regulation expressly requires reliance on routine and repeat samples, *see* 40 C.F.R. § 141.21(a)(5)-(6), (b)(7), and expressly precludes reliance on "special purpose samples," § 141.21(a)(6), and samples that have been invalidated, § 141.21(c). If an MCL violation could be established only on the basis of routine monitoring samples, then there would be no need for regulators to identify specific types of samples, unrelated to routine monitoring, that are not the proper basis for such violations. We therefore conclude that reliance on "routine" samples necessarily includes reliance on any samples that are not "special purpose samples" or otherwise invalidated.

The next question is whether the samples here were "special purpose samples;" otherwise, they are properly considered "routine" and the district court could therefore rely on them.[3] *See id.* § 141.21(a)(6). "Special purpose samples" are defined by example as "those taken to determine whether disinfection practices are sufficient following pipe placement, replacement, or repair." *Id.* This definition clarifies that "special purpose" samples are those taken at a time when the system has been altered in some way, or there are unusual circumstances, such that the sample taken may not be indicative of the water quality in general unaltered use. This is also consistent with the regulatory approach to routine monitoring samples which must be taken "at sites which are representative of water throughout the distribution system." *Id.* § 141.21(a)(1).

The samples on which the district court relied in counts eleven and twelve are not "special purpose samples" under this definition. There is no suggestion here that the samples were tainted by recent changes to the system, and, as the district court found, "[n]othing in the record suggests that the subject samples were less accurate or probative than other 'routine' or 'repeat' samples." There is also no suggestion here that the samples were otherwise invalid or unreliable, so it was reasonable and consistent with the regulation to rely upon them. We therefore conclude that the samples in question were "routine" and we affirm summary judgment on counts eleven and twelve.

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[3] Neither party suggests that these samples were invalid under the regulation or compliant with total coliform MCL requirements.

IV

A

The remainder of the Appellants' claims on appeal center on the district court's choice of remedy and the process by which the remedy was determined. The Appellants argue that the district court abused its discretion in ordering divestiture because the court did not closely tailor injunctive relief to address the threat of future harm or exercise the least possible power adequate to achieve the proposed end. Their argument in summary is that the district court: (1) erred in reacting to past violations and not considering the current status because the facts show a "sharp reduction in violations after 1994" in the Small Utilities; and (2) erred in not considering each utility separately, specifically referring to Toro, which has been in regulatory compliance since 1994.

The Appellants assert that the district court exceeded its statutory authority in ordering divestiture of the Small Utilities. The Appellants base their claim on the argument that the court may not order such a remedy because Congress failed to list divestiture expressly as a possible remedy under the SDWA.[4] However, the court will not generally infer restrictions on inherent judicial authority

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[4] The Appellants raise this issue for the first time on appeal and so we could consider it waived. *See Carlson,* 900 F.2d at 1349. The Appellants were well aware that the government was seeking complete divestiture and that the district court had proposed partial divestiture, *see Alisal II,* 326 F.Supp.2d at 1027, and they fail to explain why they did not or could not challenge the district court's authority at that time. However, this is a pure question of law and the record is sufficient to review the issue on appeal. We therefore conclude that the government will not be prejudiced if we reach the issue here. *See Carlson,* 900 F.2d at 1349.

from congressional silence: "[U]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Owner Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 367 F.3d 1108, 1112 (9th Cir. 2004) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Where the public interest is involved, "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398 (citation omitted).

Here, the SDWA gives the district court authority to enter "such judgment as protection of public health may require." 42 U.S.C. § 300g-3(b). There is no limiting language, so the statute incorporates the full panoply of the court's equitable powers. *Cf. United States v. Mass. Water Res. Auth.*, 48 F. Supp. 2d 65, 71-72 (D. Mass. 1999) (concluding that the SDWA enforcement provision does not "strip the courts of their equitable powers"). We therefore conclude that ordering partial divestiture was not outside of the district court's authority.[5]

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[5] In a related argument, the Appellants assert that the district court impermissibly encroached on the power of the California Public Utility Commission ("CPUC"), which has some jurisdiction over public drinking water. *See Hartwell Corp. v. Superior Court*, 38 P.3d 1098, 1108-12 (Cal. 2002) (discussing the complex overlap in authority over drinking water regulation between DHS and the CPUC). They advance no legal basis to explain how the fact that CPUC has some authority over water systems negates the district court's broad authority to enforce federal laws through exercise of its equitable powers. Moreover, as the government points out, the sales are necessarily subject to approval by the CPUC. *See Alisal II*, 326 F. Supp. 2d at 1029. The Appellants' argument is without merit.

"We review a district court's decision to issue a permanent injunction for abuse of discretion, but we review any determination underlying the court's decision by the standard that applies to that determination." *United States v. Hovsepian*, 359 F.3d 1144, 1156 (9th Cir. 2004) (en banc) (citing *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 826 (9th Cir. 2001)). The district court's choice of remedies is reviewed for an abuse of discretion. *See Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). Review of the scope of injunctive relief is also for an abuse of discretion. *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 823 (9th Cir. 2002). The Appellants do not allege that there were any clearly erroneous findings of fact,[6] so we may only reverse if we find that the district court misapplied the law or "rule[d] in an irrational manner." *Chang v. United States*, 327 F.3d 911, 925 (9th Cir. 2003) (quoting *United States v. Sherburne*, 249 F.3d 1121, 1125-26 (9th Cir. 2001)).

In arguing that the district court was reacting only to past conduct and not considering recent improvements, the Appellants mischaracterize the record. The district court expressly considered the Appellants' overall improvements in compliance subsequent to initiation of this enforcement suit, but found (and it is not challenged) that

[6] The Appellants do assert in a footnote of their brief to this Court that their son, Thomas Adcock, was qualified to manage the water systems. This could be construed as challenging the district court's finding that the Appellants lacked sufficient managerial competence to comply with the SDWA. *See Alisal II*, 326 F. Supp. 2d at 1014, 1023-25. However, the issue is not squarely presented, and regardless is without merit. The district court specifically outlined Thomas Adcock's shortcomings with respect to managing the family business. *See id.* at 1023-25. We conclude that these findings are not clearly erroneous.

Appellants *continued* to violate reporting requirements, *and produce "inaccurate test results and unreasonable* delay in addressing incidences of contamination . . . through and including the time of trial." *Alisal II*, 326 F. Supp. 2d at 1018; *see id.* at 1026. There are extensive factual findings demonstrating Appellants' continued noncompliance, which did not cease after initiation of this litigation. *Id.* at 1018-21. Moreover, the district court found and recounted the Appellants' continued unwillingness to work with the government, which suggests that ongoing compliance would continue to be problematic. *See Alisal III*, 326 F. Supp. 2d at 1036-37; *Alisal II*, 326 F. Supp. 2d at 1022-23. Given the Appellants' unwillingness or inability to comply in an accurate and timely manner while under the close supervision of the EPA and the district court, it was rational to conclude that the Appellants' behavior would not improve once this litigation ends.

Similarly, Appellants' argument that Toro should not have been sold because it has been compliant since 1994 is not persuasive. The district court based its partial divestiture order on the rationale that Appellants could not meet their regulatory obligations given the number of water systems they controlled and the pervasive scope of the problems involved with the various systems. *See Alisal II*, 326 F. Supp. 2d at 1024, 1026 (noting that evidence showed lack of "managerial resources and expertise to manage effectively the numerous water systems . . . , especially the smaller ones"). The district court's decision reflects its well-supported belief that the Appellants' efforts were spread too thinly, both financially and administratively, across the various systems and that they were not capable of handling more than one system in a manner compliant with all regulatory requirements. *See id.* at

1028. This is not an irrational conclusion given the Appellants' poor overall performance history, and is a valid concern in fashioning an appropriate remedy.

"In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest." *Idaho Watersheds Project*, 307 F.3d at 833 (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). Clearly, the Adcocks have an understandable personal interest in maintaining their family business and a property interest in their ownership of the various systems. On the other hand, there is no question that the public interest at stake here, the quality of public drinking water and the health and safety of the consumers, is fundamental.

The record reflects that the district court adopted a reasonable compromise in fashioning appropriate relief and tailored a remedy that took into consideration both the substantial public interest and the Adcocks' personal interest. The government originally asked for a complete divestiture; the Appellants asked only to have to implement recommended system upgrades (which the record shows they could not afford to finance). The district court did not order sale of the largest water system, Alco. There, the district court only ordered implementation of the recommended improvements.

The district court's remedy allows the Appellants to control operations and service for approximately 90 percent of their original customer base in a very streamlined fashion, thereby "giving [Appellants] a clear opportunity to demonstrate that they can operate at least one water system in compliance with the law." *Alisal II*, 326 F. Supp. 2d at 1028. The Appellants themselves admit that

most of the compliance problems occurred in the Small Utilities (other than Toro). The Appellants have proven through their service history and throughout this litigation that they were unable to manage effectively the several water systems in order to serve the public health. Simply put, they now have the opportunity to prove that they can safely manage just one.

The Appellants argue that letting them continue to own and operate Alco shows that the court was acting inconsistently, but we think that it demonstrates that the district court was balancing the competing interests of the public and the Appellants, despite the egregious nature of their prior course of conduct. *Alisal II*, 326 F. Supp. 2d at 1028-29 (concluding that while full divestiture was fully justified, partial divestiture was a "less drastic remedy" and required under principles of equity). While other appropriate remedies are conceivable, our review is limited to whether the district court erroneously applied the law or acted irrationally in imposing the remedy it did.

We conclude that the Appellants' personal interests in maintaining ownership over the Small Utilities is substantially outweighed by the profound public interest at stake here. The regulatory violations that the Appellants committed were numerous and significant. They were entrusted with safeguarding the health and welfare of the thousands of individuals who rely on these water systems, and they have not effectively responded to the water quality problems. Furthermore, the record supports the district court's conclusions that the Appellants have acted in a manner inconsistent with an appreciation for the importance of their obligation to the public. We conclude the district court fashioned a rational remedy that fairly

took into consideration the competing interests. There was no abuse of discretion in the means employed.

B

The Appellants assert next that the district court violated their due process rights by: (1) conducting the receivership bidding process in secret; and (2) improperly considering and giving weight to public comments and letters not part of the record, not taken under oath, and not subject to cross-examination. However, the Appellants waived their due process claim regarding the receivership bidding process by failing to raise it in the district court. They state that they "repeatedly complained" that they were not being informed about the bidding and sales process. However, their only support in the record is that they once told the district judge that they did not know the status of the sales and requested additional information, and the court immediately ordered that the receiver make sales-related documents available as part of his duties.

This single evidentiary proffer is hardly evidence of repeated complaints. It does not demonstrate that the receiver willfully withheld information (or even that the Appellants had ever requested the information before or after that day). Additionally, it does not rise to the stature of a "due process" violation. Thus, the Appellants do not demonstrate through the record how their participation was unjustly limited, and we therefore will not consider the claim. *See, e.g., Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("We will not take up an issue not properly raised below unless necessary to prevent manifest injustice.") (citation omitted).

As to the public hearings, the Appellants argue that they were not allowed to "question" the process, but they did not object to the process as it occurred. On appeal, the Appellants admit they did not object to the district court's *holding* the public hearings, so this issue is waived. Nor did the Appellants object to the lack of evidentiary formality in conducting the hearings. No objections were timely raised that the speakers were not sworn and were not subject to cross-examination. However, they did object to the district court's *considering* the statements and letters gathered through the hearing process in the divestiture proceedings, so this aspect of the claim is properly before us.

As the Supreme Court acknowledges, "due process" is difficult to define. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-25 (1981). The process that is due varies according to the nature of the right and the type of proceedings. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (alteration in original). At its core, due process requires that a party have adequate notice and opportunity to be heard. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). In considering whether a district court accorded adequate due process, appellate courts "must look at the actual substance, not the name or form, of the procedure to see if the claimants' interests were adequately safeguarded." *SEC v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992) (discussing summary receivership proceedings and citing *SEC v. Wencke*, 783 F.2d 829, 836 (9th Cir. 1986)).

We conclude that there was no due process violation in the district court considering the information obtained through the public hearings. Importantly, there is no suggestion that the Appellants were denied the basic elements of due process – adequate notice and opportunity to be heard. This is not a situation where a party was unaware of an adverse proceeding or the district court denied a party forms of process to which they had expressly asserted a right. The Appellants were well aware of the contemplated hearing process and their counsel attended the hearings. There is no showing that they were in any way limited in their ability to participate in the hearings or to refute any testimony presented, or that their interests were prejudiced or marginalized in this process. Accordingly, we do not see how the Appellants' due process rights were denied. *See Guenther v. Comm'r*, 939 F.2d 758, 760 (9th Cir. 1991) (explaining that a party's due process rights would be infringed if they were "unfairly prejudiced" by ex parte communication).

Although the form of this process was not typical for the courts, and we do not endorse such a practice in routine civil enforcement actions, the substance of the evidence adduced at the hearings is similar to that which could have been introduced by the government through affidavits or testimony. *See, e.g., FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 576 (7th Cir. 1989) (holding that, where defendants were found to have committed deceptive trade practices in a nationwide telemarketing operation, the trial court did not abuse its discretion in admitting affidavits from consumers who had purchased travel vouchers from the defendants). In a case of this magnitude, directly affecting public health, evidence of the views of the individuals affected by the outcome was relevant to the district

court's choice of remedy. The Appellants have pointed to no legal authority that would bar the district court from proceeding in a public-hearing forum and they did not timely object to proceeding in such a fashion. We recognize that "a district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad," *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986), and the hearing process was an efficient and direct way for the district court to consider the views of the interested public, which had a manifest and significant stake in the proceedings.

Nor do the Appellants point to authority that would require the district court to conduct a remedy-phase hearing in the same manner or under the same evidentiary standards that it conducts a trial. In the context of a civil suit "cross-examination is not, in every instance, a sine qua non of due process. It all depends on the situation." *David v. City of Los Angeles*, 307 F.3d 1143, 1147 (9th Cir. 2002), *rev'd on other grounds*, 538 U.S. 715 (2003); *see U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1287 n.13 (11th Cir. 2001) (noting that "[o]f course, the Confrontation Clause is not applicable to civil cases"). In *Federal Trade Commission v. Figgie International, Inc.*, 994 F.2d 595 (9th Cir. 1993), for example, we allowed the district court to base its calculation of the maximum amount of redress for which the defendant might be liable on the agency's summation of 127 letters of complaint that it had received from private citizens. *Id.* at 608-09 (determining that admission of the letters fell into the residual

hearsay exception).[7] Similarly, the district court here considered evidence of unsworn public comment not to demonstrate the violations that the Appellants committed, but for the limited purpose of fashioning a remedy for the violations.

In concluding that there was no due process violation in this case, we also rely substantially on the fact that the Appellants' primary complaints against the evidence adduced at the public hearings – the lack of sworn testimony and cross-examination – are the direct result of their own failure to object to the district court holding such hearings and their failure to timely object to the manner in which the hearings were held and in which the evidence was introduced. They assert that they were "never allowed" to address the public letters and comments, but they fail to point out where in the record they ever asked to do so, despite the fact that counsel was present at the hearings. Had the Appellants timely objected to the proceedings or requested that the hearings be conducted in a more formal way, the district court could have modified the process and cured any potential defect. *See United States v. Odom*, 736 F.2d 104, 114 (4th Cir. 1984) (noting that "[i]t is well settled" that a party waives a challenge to failure to swear in a witness by failing to raise the point

[7] The *Figgie International* court relied on its analysis of whether the complaint letters were admissible under the Federal Rules of Evidence. *See* 994 F.2d at 608-09. The Appellants have not raised such an argument here on appeal, although their "due process" claim could properly be characterized as an unpreserved challenge to the district court's admission of such evidence. Because the Appellants did not raise an evidentiary objection to the district court or on appeal, we consider it waived.

during the witness's testimony, when it could have been corrected).

We hold that the Appellants' due process rights were not violated by the district court's fashioning a remedy for regulatory violations by relying in part on evidence introduced through public hearings where: (1) the Appellants failed to object to the district court's conducting such hearings; (2) the Appellants failed to object to the witnesses' not being sworn or subject to cross-examination; and (3) the Appellants failed on appeal to show how they were prejudiced by admission of the evidence.[8]

V

The Appellants argue next that the court-ordered sale of the Small Utilities was confiscatory because the sale prices realized were not indicative of their true value, and they seek just compensation under the Fifth Amendment's takings clause. The government points out that the takings clause issue was not raised below and should therefore be waived. In response, the Appellants contend that they raised a takings claim below in their comments to the Pierotti report. They cite to two places in the record. First, in the context of disputing the method of valuation, they argued before the district court only that "[w]here [they are] forced to sell the utility for less than its rate base, as the [r]eceiver recommends here, there is a taking that violates the Constitution." And second, they prefaced a feasibility argument with: "in light of the constitutional

[8] We emphasize that our holding is extremely narrow. Had the Appellants made timely objections to this unusual procedure or demonstrated prejudice, our analysis might be different.

issues about confiscation. . . ." These are the only references to a takings claim in the record covering years of litigation.

These references were brief, conclusory statements made with no supporting legal argument and so are insufficient to preserve a takings claim for appeal. *See, e.g., Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996) ("To have been properly raised below, the argument must be raised sufficiently for the trial court to rule on it.") (internal quotation marks and citation omitted); *Banks v. Rockwell Int'l N. Am. Aircraft Operations*, 855 F.2d 324, 326 (6th Cir. 1988) (holding that a "vague reference" to an issue before the district court was insufficient to preserve that issue on appeal). We therefore consider the Appellants' takings claim waived.

VI

The Appellants challenge the overall monetary penalty imposed on the basis that the district court did not consider the report of Dr. Berk that they submitted. The report challenged the valuation findings of the court-appointed accountant, Pierotti. The Appellants contend that Alco was substantially overvalued and that the resulting penalty was excessive. The substance of their argument is that the district court initially suggested that they would be allowed to object to the Pierotti report at the penalty hearing, but then had a "change of heart" and refused to consider the information.

The district court's decision to exclude expert testimony is reviewed for an abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Prior to seeking to introduce Dr. Berk's report, the Appellants had

already introduced an expert witness, Carl Danner, who testified as to valuation of the water systems. After reviewing the evidentiary proffer of Dr. Berk's report, the district court noted that when it said it would consider further evidence, it had expected evidence about "any changes in circumstances that might affect Mr. Pierotti's analysis." The court concluded that Dr. Berk's report was instead simply cumulative of the Danner testimony and "[v]iewed as a whole, Dr. Berk's opinions concern[ed] facts known to and litigated by the parties at trial." *Alisal III*, 326 F. Supp. 2d at 1037.

The Appellants fail to show how Dr. Berk's report was new or different from the evidence they had introduced at trial, and thus they fail to show how the district court abused its discretion in dismissing the report as cumulative. We affirm the exclusion of the proffered evidence. The Appellants raise no other argument as to why the penalty was excessive and so we also affirm the penalty as imposed.[9]

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[9] The penalty imposed was well below the maximum penalty allowed by statute, which states, in part, that:

> [I]f the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of not to exceed $25,000 for each day in which such violation occurs.

42 U.S.C. § 300g-3(b); *id.* at § 300g-3(g)(3)(A). The Appellants committed 232 violations, many of which could be considered as extending over multiple days, which the district court concluded would result in a maximum civil penalty range from $17 million to $400 million. *Alisal III*, 326 F. Supp. 2d at 1035. The government argued that a penalty of $3 million to $5 million dollars was appropriate. As noted, the district court ultimately imposed a penalty of $500,000 with a $300,000 offset

(Continued on following page)

VII

In its receivership order, the district court enjoined not only the named defendant individuals, Robert and Natholyn, but also their children, Thomas and Lynette, from "acquir[ing] any new interest, financial or otherwise, in any 'public water system' . . . without the express permission of [the] Court." *Alisal II*, 326 F. Supp. 2d at 1032. The Appellants do not claim that the substantive injunctive limitation is overly broad or otherwise challenge the scope of the injunction but argue that the injunction is simply not valid against Thomas and Lynette because they were not parties named in the lawsuit. The Appellants specifically seek a ruling that would invalidate the injunction under Federal Rule of Civil Procedure 65(d). However, we cannot reach this issue.

Although not specifically mentioned in Appellants' briefs,[10] Federal Rule of Appellate Procedure 3(c) requires the notice of appeal to:

> *[S]pecify the party or parties taking the appeal by naming each one in the caption or body of the notice*, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X". . . .

FED. R. APP. P. 3(c)(1)(A) (emphasis added). Non-parties to the original action *may* appeal where they are "bound by the order from which they were seeking to appeal." *Devlin*

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for the receiver's acceptance of bids that were not the highest bids on three water systems. *Id.* at 1038-39.

[10] "Jurisdictional issues must be raised by this court *sua sponte*." *MacKay v. Pfeil*, 827 F.2d 540, 542 (9th Cir. 1987).

v. Scardelletti, 536 U.S. 1, 8 (2002). But non-parties must also pass through the ordinary "jurisdictional threshold" of Rule 3(c), which requires that they be named in the notice of appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Moreover, the Appellants are bound by the ordinary time-constraints imposed upon parties and non-parties alike by Federal Rule of Appellate Procedure 4(a)(1), which requires that a notice of appeal be filed within 30 days after judgment. *See* FED. R. APP. P. 4(a)(1).

Here, Thomas and Lynette were not named as defendants in the notice of appeal. The notice of appeal named the following defendants: Alisal Water Corporation; Toro Water Service, Inc.; North Monterey County Water Service, Inc.; Moss Landing Water Service, Inc.; Robert T. Adcock; and Natholyn P. Adcock. Because Thomas and Lynette were not included in the first notice of appeal, they were required to file a separate appeal within 30 days of judgment. They failed to do so. Moreover, it is not objectively clear from the notice of appeal that they intended to appeal. *Cf. Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1149 (9th Cir. 2003) (holding that when a party's intent to appeal is objectively clear, that party is not prevented from going forward under Federal Rule of Appellate Procedure 3(c)); *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 610 (9th Cir. 2003) (same). Consequently, we do not have jurisdiction to consider their challenge to the injunction.

VIII

We conclude that the district court had subject matter jurisdiction over this SDWA civil enforcement action and

did not abuse its discretion or violate the Appellants' due process rights in fashioning the remedy imposed.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ALISAL WATER CORPORATION; TORO WATER SERVICE, INC.; NORTH MONTEREY COUNTY WATER SERVICE, INC.; MOSS LANDING WATER SERVICE, INC.; NATHOLYN P. ADCOCK; ROBERT T. ADCOCK, *Defendants-Appellants.*	No. 02-15907 D.C. No. CV-97-20099-JF
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ALISAL WATER CORPORATION; TORO WATER SERVICE, INC.; ROBERT T. ADCOCK; NORTH MONTEREY COUNTY WATER SERVICE, INC.; MOSS LANDING WATER SERVICE, INC.; NATHOLYN P. ADCOCK, *Defendants-Appellants*, and PATRICIA ADCOCK; BRUCE PIERSON; DAVID M. SIMCHO, *Defendants*, JOHN W. RICHARDSON, *Receiver.*	No. 04-16210 D.C. No. CV-97-20099-JF OPINION

Appeal from the United States District Court
for the Northern District of California
Jeremy Fogel, District Judge, Presiding

Argued and Submitted
June 13, 2005 – San Francisco, California

Filed October 13, 2005

Before: Richard C. Tallman, Jay S. Bybee, and
Carlos T. Bea, Circuit Judges

Opinion by Judge Tallman

COUNSEL

Marc P. Fairman, San Francisco, California, for the defendants-appellants.

Lori Jonas, Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

TALLMAN, Circuit Judge:

Appellants Robert and Natholyn Adcock and various private water systems they owned and operated in Monterey County, California, violated various public health and safety regulations under the federal Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j. They appeal the district court's orders requiring divestiture of all except the largest water system and imposing financial penalties. We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(2) and affirm.

I

Prior to this litigation, the Adcock family water system business was organized into four corporations. The largest, Alisal Water Corporation ("Alisal"), owned and operated several public water systems, some of which are named as defendants: Alco Water Service ("Alco"), Salinas Division, Blackie Road Water System # 18, Pine Canyon Division of Alco Water Service, Buena Vista Water System, Wildwood Water System, San Jerardo Water System, Vierra Canyon Water System, Vierra Estates Water System, and Langley/Valle Pacifico Water System. Alisal also wholly owned two subsidiary corporations: Moss Landing Harbor District, which operated the Moss Landing public water system, and North Monterey County Water Service, Inc. ("NORMCO"), which operated NORMCO public water system. The Adcocks held 82.5 percent ownership in Alisal. The fourth corporation was Toro Water Service ("Toro"), which owned and operated a public water system of the same name and was wholly owned by the Adcocks.[1]

The United States commenced this civil enforcement action in January 1997 on behalf of the United States Environmental Protection Agency ("EPA") against the

[1] Appellants represent that, as of 2001, these water systems collectively served approximately 28,000 people, of which Alco served the majority, approximately 25,000 people. The other systems served significantly fewer people: Blackie Road Water System (66), San Jerardo Water System (194), Vierra Canyon Water System (150), Langley/Valle Pacifico Water System (95), Buena Vista Water System (528), Moss Landing Harbor District (550), NORMCO (682), and Toro (1100). Alisal has restructured since the onset of this civil action and Wildwood Water System and the Pine Canyon Division were reorganized into the other divisions.

Appellants. Numerous violations of SDWA regulations were asserted, including exceeding total coliform Maximum Contaminant Levels ("MCL"), failing to monitor for lead and copper, failing to take required monitoring samples, failing to give required agency and public notices, failing to report and falsifying monitoring reports, and failing to keep proper records. The action was initiated in response to an August 1996 written request from Dr. David Spath, Chief of the Division of Drinking Water and Environmental Management, California Department of Health Services ("DHS"). Twelve counts of multiple regulatory violations (totaling 232 violations) and one count of fraudulent conveyance were alleged.

The district court granted summary judgment to the government on the first nine counts in August 2000. *See United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 939 (N.D. Cal. 2000) ("*Alisal I*"). After trial, the district court again ruled for the government on the tenth count (fraudulent conveyance). In November 2002, the district court granted summary judgment against the corporate defendants, but not against Robert and Patricia Adcock individually, on the remaining three counts, eleven to thirteen. As to the regulatory violations, the Appellants challenge on appeal only the partial summary judgment on counts eleven and twelve against Moss Landing and Vierra Canyon.

The district court found that the proliferation of small water systems had stretched the Adcocks beyond their ability to manage effectively and remedy the continuing health violations, endangering their customers. To remedy the underlying violations the district court initially ordered that all of the smaller water systems, including NORMCO and Toro (collectively the "Small Utilities"), be

placed in receivership and directed the receiver to investigate and make recommendations about selling the Small Utilities. *See United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1010, 1028-32 (N.D. Cal. 2002) ("*Alisal II*"). The Adcocks were permitted to remain in control of only the largest individual water system, Alco, and they were ordered to implement substantial improvements that had been recommended in a previously compiled consultant's report and to allow monitoring by the receiver. *Id.* at 1030-31. The district court denied the Appellants' motion to stay the order, and a prior panel of our court affirmed the denial of a stay. During this time, the district court held extensive formal hearings regarding the Appellants' stewardship and their course of dealings with federal and state health officials. *See id.* at 1019-22 (summarizing findings). The district court also held two public meetings (in August and December 2003), where utility customers were allowed to speak about their concerns, and the judge invited the public to send written suggestions.

In November 2003, the receiver filed his report and the district court subsequently adopted the recommended sale of the Small Utilities. The court ordered that most of the systems be sold to the highest bidders, but ordered three of the systems to be sold to a non-profit public entity, the Pajaro/Sunny Mesa Community Services District ("PSMCSD"). *See United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1032, 1038-39 (N.D. Cal. 2004) ("*Alisal III*"). PSMCSD did not have the highest bid, but the district court found that sale to PSMCSD would best serve the public interest. *Id.* at 1037 n.6. The district court denied the Appellants' motion to stay the sale order, and we affirmed the denial of a stay.

The district court also imposed monetary penalties against the Appellants. For purposes of determining the appropriate penalty amount, the district court appointed accountant Richard Pierotti to assess the liquidation value of all of the water utilities and the Adcocks' personal assets. The Appellants hired Dr. Joel Berk to review Pierotti's valuation methodology; Dr. Berk concluded that Alco was of substantially less value than Pierotti had found. The district court struck Dr. Berk's report as cumulative to evidence previously introduced by the Appellants. *Id.* at 1037-38. The district court imposed a penalty of $500,000, but then credited the Appellants $300,000 as an offset for the shortfall from not accepting all of the high bids on the sale of the Small Utilities, leaving a $200,000 total penalty due. *Id.* at 1038-39. The Appellants challenge the order appointing a receiver (No. 02-15907) and the order authorizing sale of the utilities and imposing penalties (No. 04-16210).

II

The Appellants also challenge the district court's jurisdiction over this entire eight-year litigation. They assert for the first time on appeal that the district court lacked subject matter jurisdiction because the controlling statute states that a federal EPA enforcement action must be requested by "the chief executive officer of the State" or "agency of [the] State which has jurisdiction over compliance by public water systems." 42 U.S.C. § 300g-3(b)(2). They challenge as legally insufficient Dr. Spath's request letter to demonstrate that the proper state agency requested EPA enforcement because: (1) Dr. Spath is not the head of the DHS, which they assert is the agency with primary jurisdiction over public water systems; and (2)

there is nothing in the record establishing that DHS delegated such authority to him. *See* Cal. Health & Safety Code § 116325 (granting DHS the authority to enforce state drinking water regulations).

"The existence of subject matter jurisdiction is a question of law reviewed de novo." *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang,* 376 F.3d 831, 833 (9th Cir. 2004). "[District courts] are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 125 S. Ct. 2611, 2616 (June 23, 2005) (internal quotation marks and citation omitted). As a general matter, federal courts have subject matter jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." *See* 28 U.S.C. § 1331. By this principle, suits seeking compliance with, or remedies for, violations of federal water quality statutes and regulations present federal questions. *Cf. Chasse v. Chasen,* 595 F.2d 59, 61 (1st Cir. 1979) (citation omitted) ("It is beyond dispute that validly issued administrative regulations . . . may be treated as 'laws of the United States' under § 1331(a).").

This general grant of federal question jurisdiction is not limitless – Congress may negate district court jurisdiction "[b]y virtue of . . . a specific reference or assignment." *ErieNet, Inc. v. Velocity Net, Inc.,* 156 F.3d 513, 519 (3d Cir. 1998); *see, e.g., Staacke v. United States Sec'y of Labor,* 841 F.2d 278, 280 (9th Cir. 1988) ("[F]ederal question jurisdiction [is] subject . . . to preclusion-of-review statutes created or retained by Congress.") (internal quotation marks and citation omitted); *La Voz Radio de la Communidad v. FCC,* 223 F.3d 313, 319 (6th Cir. 2000). However, absent statutory direction to the contrary, a district court validly

exercises its jurisdiction over actions "arising under" federal laws.

In addition to general federal question jurisdiction, "district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress," except as otherwise provided by Congress. 28 U.S.C. § 1345. Any exception to the general rule of § 1345 must be clear. *See Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 808-09 (1976) ("When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation.") (quoting *Rosecrans v. United States,* 165 U.S. 257, 262 (1897)).

Therefore, under either 28 U.S.C. § 1331 or § 1345, the inquiry here rests on whether the SDWA contains any special limits or exceptions to the district court's general statutory subject matter jurisdiction. Various provisions reflect congressional intent to confer subject matter jurisdiction over SDWA actions to federal district courts. *See, e.g.*, 42 U.S.C. § 300g-3(b) (granting the government authority to "bring a civil action in the appropriate United States district court" to enforce compliance with agency orders); § 300j-7(a)(2) (requiring a petitioner to file a petition for review of agency action "in the circuit in which the petitioner resides or transacts business which is directly affected by the action"); § 300j-8(a) (granting district courts jurisdiction over qualified citizen's civil actions). Indeed, "[w]henever any civil penalty sought by the [government] . . . for a violation of an applicable requirement exceeds $25,000," as in the case at bar, the government is statutorily required to bring a civil action in

"the appropriate United States district court." *Id.* § 300g-3(g)(3)(C).

The SDWA statutory scheme also creates certain narrow exceptions to the district court's jurisdiction, *see, e.g., id.* §§ 300g-1(b)(1)(B)(i)(III) & 300h-2(c)(7), but there is no express statutory negation of the district court's federal question jurisdiction over enforcement of the SDWA under 42 U.S.C. § 300g-3(b), the provision at issue here. Congress's express identification of particular aspects of SDWA litigation and agency action that are not subject to judicial review demonstrates that Congress was well aware of its power to limit the scope of the district court's subject matter jurisdiction over certain SDWA claims.

The Appellants argue that 42 U.S.C. § 300g-3(b)(2) divests the district court of jurisdiction, but we disagree. Rather than creating a special exception to the district court's jurisdictional authority to hear this suit, the statute reflects only the limitations on the government's authority to bring this suit. The statute states that the federal government "may bring a civil action" in district court "if" so requested (or if authorized under conditions not relevant here), 42 U.S.C. § 300g-3(b)(2); it says nothing to limit the district court's jurisdiction over such an action if the government was not acting pursuant to an authorized request from the state.[2]

[2] The Appellants could certainly have raised the issued of whether Dr. Spath's request letter was sufficient to grant enforcement power to the federal government by moving to dismiss for the government's "failure to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure 12(b)(6), but they did not. Because the record is insufficient to answer that question on appeal and the Appellee's would be substantially prejudiced if we reached this issue so late in the proceedings, we must conclude that the claim has been waived. *See United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990).

We will not assume that Congress intended to deprive the court of subject matter jurisdiction over enforcement of federal laws where Congress has refrained from doing so and where there is no evidence of such intent. Because the SDWA includes no special provision limiting jurisdiction over federal question claims or suits brought by the United States, we conclude that the district court had subject matter jurisdiction over this suit and that federal jurisdiction to permit EPA enforcement under the SDWA statutory scheme is concurrent with that of state regulators.

III

On appeal, the Appellants concede that they committed the majority of the SDWA regulatory violations found by the district court and challenge the adverse summary judgment only on counts eleven and twelve against Moss Landing and Vierra Canyon. The government demonstrated that Moss Landing and Vierra Canyon committed eight violations of total coliform MCL regulations in 2000 and 2001. The Appellants argue that judgment was impermissibly based on "special" samples taken by the Appellants to investigate anomalous results provided by the state. The district court found that the samples were "routine" and that the only thing that made these samples "special" was that the Appellants labeled them as such.

"We review the grant of summary judgment de novo." *Buono v. Norton,* 371 F.3d 543, 545 (9th Cir. 2004). The question we must answer is whether the government demonstrated through appropriate means that these water systems violated total coliform MCLs. By regulation, a water system which collects fewer than 40 samples per month in accordance with its routine monitoring

program is in compliance with total coliform MCL if no more than five percent of samples in a given month are total coliform-positive. 40 C.F.R. § 141.63(a)(1). A total coliform MCL violation is based on "routine" and "repeat" samples, *id.* § 141.21(a)(5)-(6), (b)(7), and may not be based on samples that have been invalidated, § 141.21(c), or on "[s]pecial purpose samples," § 141.21(a)(6).

The regulation details the requirements for a "routine monitoring plan," which requires collection of "total coliform samples at sites which are representative of water throughout the distribution system according to a written sample siting plan." *Id.* § 141.21(a). But the regulation does not expressly define "routine samples" for purposes of establishing a violation. The Appellants interpret 40 C.F.R. § 141.21 as requiring that only samples taken as part of a routine monitoring plan be considered "routine." The government acknowledges that only "routine" and "repeat" samples may be relied upon, and that the samples at issue here were not "repeat" samples or taken as part of a routine monitoring plan. However, the government asserts, and the district court concluded, that "routine" samples are any samples which are not "special" under the regulation and are representative of water throughout the system. Therefore, the operative question is what constitutes a "routine" sample.

An agency is entitled to interpret its own regulation and "ordinarily its construction will be affirmed if it is not clearly erroneous or inconsistent with the regulation." *Pac. Coast Med. Enters. v. Harris,* 633 F.2d 123, 131 (9th Cir. 1980) (citations omitted). However, because neither party introduced evidence of an official agency definition of a "routine" sample for purposes of establishing a violation under the regulation, we do not necessarily defer to the

government's position. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (noting that deference does not extend to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice"). Such deference may still be appropriate, however, when there is "no reason to suspect" that an agency interpretation introduced only through a legal brief "does not reflect the agency's fair and considered judgment on the matter." *Auer v. Robbins,* 519 U.S. 452, 462 (1997).

We need not decide precisely how much deference the EPA is due here because we conclude that the only reasonable interpretation of 40 C.F.R. § 141.21(a) is the one espoused by the government; we therefore agree that any sample that is representative of water throughout the system and not a "special purpose sample" or otherwise invalidated is "routine" and may suffice to establish a regulatory violation. The Appellants' interpretation of the regulation is untenable. Precluding reliance on accurate water quality samples simply because they were not taken according to a preset plan would prevent the government from identifying and remedying total coliform MCL violations in a variety of contexts, such as where the water utility itself submitted only negative samples under its routine monitoring schedule. This effectively could insulate a violator from judgment in cases where the water utility purposefully conceals excessive coliform test results in its routine monitoring plan reporting or fails to keep accurate records of testing, as the Appellants did here. *See Alisal I,* 114 F. Supp. 2d at 934. Interpreting the regulation to allow reliance on only samples submitted under a routine monitoring plan would clearly undermine the effectiveness of the reporting requirements and threaten public health and safety, and so we reject this unreasonable

interpretation of the statute. *Cf. SEC v. Edwards,* 540 U.S. 389, 395 (2004) (addressing securities law and declaring that the "[Supreme] Court will not read into the . . . laws a limitation not compelled by the language that would so undermine the laws' purposes.").

Moreover, our interpretation is consistent with the overall regulatory scheme. When interpreting a regulation, we must avoid an interpretation that would render another regulation superfluous. *See, e.g., Dodd v. United States,* 125 S. Ct. 2478, 2490 (2005) (Stevens, J., dissenting). As noted, the regulation expressly requires reliance on routine and repeat samples, *see* 40 C.F.R. § 141.21(a)(5)-(6), (b)(7), and expressly precludes reliance on "special purpose samples," § 141.21(a)(6), and samples that have been invalidated, § 141.21(c). If an MCL violation could be established only on the basis of routine monitoring samples, then there would be no need for regulators to identify specific types of samples, unrelated to routine monitoring, that are not the proper basis for such violations. We therefore conclude that reliance on "routine" samples necessarily includes reliance on any samples that are not "special purpose samples" or otherwise invalidated.

The next question is whether the samples here were "special purpose samples;" otherwise, they are properly considered "routine" and the district court could therefore rely on them.[3] *See id.* § 141.21(a)(6). "Special purpose samples" are defined by example as "those taken to determine whether disinfection practices are sufficient following pipe placement, replacement, or repair." *Id.* This

[3] Neither party suggests that these samples were invalid under the regulation or compliant with total coliform MCL requirements.

definition clarifies that "special purpose" samples are those taken at a time when the system has been altered in some way, or there are unusual circumstances, such that the sample taken may not be indicative of the water quality in general unaltered use. This is also consistent with the regulatory approach to routine monitoring samples which must be taken "at sites which are representative of water throughout the distribution system." *Id.* § 141.21(a)(1).

The samples on which the district court relied in counts eleven and twelve are not "special purpose samples" under this definition. There is no suggestion here that the samples were tainted by recent changes to the system, and, as the district court found, "[n]othing in the record suggests that the subject samples were less accurate or probative than other 'routine' or 'repeat' samples." There is also no suggestion here that the samples were otherwise invalid or unreliable, so it was reasonable and consistent with the regulation to rely upon them. We therefore conclude that the samples in question were "routine" and we affirm summary judgment on counts eleven and twelve.

IV

A

The remainder of the Appellants' claims on appeal center on the district court's choice of remedy and the process by which the remedy was determined. The Appellants argue that the district court abused its discretion in ordering divestiture because the court did not closely tailor injunctive relief to address the threat of future harm or exercise the least possible power adequate to achieve the

proposed end. Their argument in summary is that the district court: (1) erred in reacting to past violations and not considering the current status because the facts show a "sharp reduction in violations after 1994" in the Small Utilities; and (2) erred in not considering each utility separately, specifically referring to Toro, which has been in regulatory compliance since 1994.

The Appellants assert that the district court exceeded its statutory authority in ordering divestiture of the Small Utilities. The Appellants base their claim on the argument that the court may not order such a remedy because Congress failed to list divestiture expressly as a possible remedy under the SDWA.[4] However, the court will not generally infer restrictions on inherent judicial authority from congressional silence: "[U]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Owner Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 367 F.3d 1108, 1112 (9th Cir. 2004) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Where the public interest is involved, "equitable powers assume an even broader and more flexible character than when only a

[4] The Appellants raise this issue for the first time on appeal and so we could consider it waived. *See Carlson*, 900 F.2d at 1349. The Appellants were well aware that the government was seeking complete divestiture and that the district court had proposed partial divestiture, *see Alisal II*, 326 F. Supp. 2d at 1027, and they fail to explain why they did not or could not challenge the district court's authority at that time. However, this is a pure question of law and the record is sufficient to review the issue on appeal. We therefore conclude that the government will not be prejudiced if we reach the issue here. *See Carlson*, 900 F.2d at 1349.

private controversy is at stake." *Porter,* 328 U.S. at 398 (citation omitted).

Here, the SDWA gives the district court authority to enter "such judgment as protection of public health may require." 42 U.S.C. § 300*g*-3(b). There is no limiting language, so the statute incorporates the full panoply of the court's equitable powers. *Cf. United States v. Mass. Water Res. Auth.,* 48 F. Supp. 2d 65, 71-72 (D. Mass. 1999) (concluding that the SDWA enforcement provision does not "strip the courts of their equitable powers"). We therefore conclude that ordering partial divestiture was not outside of the district court's authority.[5]

"We review a district court's decision to issue a permanent injunction for abuse of discretion, but we review any determination underlying the court's decision by the standard that applies to that determination." *United States v. Hovsepian,* 359 F.3d 1144, 1156 (9th Cir. 2004) (en banc) (citing *Silver Sage Partners, Ltd. v. City of Desert Hot Springs,* 251 F.3d 814, 826 (9th Cir. 2001)). The district court's choice of remedies is reviewed for an abuse of discretion. *See Stone v. City & County of San Francisco,* 968 F.2d 850, 861 (9th Cir. 1992). Review of the scope of

[5] In a related argument, the Appellants assert that the district court impermissibly encroached on the power of the California Public Utility Commission ("CPUC"), which has some jurisdiction over public drinking water. *See Hartwell Corp. v. Superior Court,* 38 P.3d 1098, 1108-12 (Cal. 2002) (discussing the complex overlap in authority over drinking water regulation between DHS and the CPUC). They advance no legal basis to explain how the fact that CPUC has some authority over water systems negates the district court's broad authority to enforce federal laws through exercise of its equitable powers. Moreover, as the government points out, the sales are necessarily subject to approval by the CPUC. *See Alisal II,* 326 F. Supp. 2d at 1029. The Appellants' argument is without merit.

injunctive relief is also for an abuse of discretion. *Idaho Watersheds Project v. Hahn,* 307 F.3d 815, 823 (9th Cir. 2002). The Appellants do not allege that there were any clearly erroneous findings of fact,[6] so we may only reverse if we find that the district court misapplied the law or "rule[d] in an irrational manner." *Chang v. United States,* 327 F.3d 911, 925 (9th Cir. 2003) (quoting *United States v. Sherburne,* 249 F.3d 1121, 1125-26 (9th Cir. 2001)).

In arguing that the district court was reacting only to past conduct and not considering recent improvements, the Appellants mischaracterize the record. The district court expressly considered the Appellants' overall improvements in compliance subsequent to initiation of this enforcement suit, but found (and it is not challenged) that Appellants *continued* to violate reporting requirements, and produce "inaccurate test results and unreasonable delay in addressing incidences of contamination ... through and including the time of trial." *Alisal II,* 326 F. Supp. 2d at 1018; *see id.* at 1026. There are extensive factual findings demonstrating Appellants' continued noncompliance, which did not cease after initiation of this litigation. *Id.* at 1018-21. Moreover, the district court found and recounted the Appellants' continued unwillingness to work with the government, which suggests that

[6] The Appellants do assert in a footnote of their brief to this Court that their son, Thomas Adcock, was qualified to manage the water systems. This could be construed as challenging the district court's finding that the Appellants lacked sufficient managerial competence to comply with the SDWA. *See Alisal II,* 326 F. Supp. 2d at 1014, 1023-25. However, the issue is not squarely presented, and regardless is without merit. The district court specifically outlined Thomas Adcock's shortcomings with respect to managing the family business. *See id.* at 1023-25. We conclude that these findings are not clearly erroneous.

ongoing compliance would continue to be problematic. *See Alisal III,* 326 F. Supp. 2d at 1036-37; *Alisal II,* 326 F. Supp. 2d at 1022-23. Given the Appellants' unwillingness or inability to comply in an accurate and timely manner while under the close supervision of the EPA and the district court, it was rational to conclude that the Appellants' behavior would not improve once this litigation ends.

Similarly, Appellants' argument that Toro should not have been sold because it has been compliant since 1994 is not persuasive. The district court based its partial divestiture order on the rationale that Appellants could not meet their regulatory obligations given the number of water systems they controlled and the pervasive scope of the problems involved with the various systems. *See Alisal II,* 326 F. Supp. 2d at 1024, 1026 (noting that evidence showed lack of "managerial resources and expertise to manage effectively the numerous water systems . . . , especially the smaller ones"). The district court's decision reflects its well-supported belief that the Appellants' efforts were spread too thinly, both financially and administratively, across the various systems and that they were not capable of handling more than one system in a manner compliant with all regulatory requirements. *See id.* at 1028. This is not an irrational conclusion given the Appellants' poor overall performance history, and is a valid concern in fashioning an appropriate remedy.

"In issuing an injunction, the court must balance the equities between the parties and give due regard to the public interest." *Idaho Watersheds Project,* 307 F.3d at 833 (citing *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 542 (1987)). Clearly, the Adcocks have an understandable personal interest in maintaining their family

business and a property interest in their ownership of the various systems. On the other hand, there is no question that the public interest at stake here, the quality of public drinking water and the health and safety of the consumers, is fundamental.

The record reflects that the district court adopted a reasonable compromise in fashioning appropriate relief and tailored a remedy that took into consideration both the substantial public interest and the Adcocks' personal interest. The government originally asked for a complete divestiture; the Appellants asked only to have to implement recommended system upgrades (which the record shows they could not afford to finance). The district court did not order sale of the largest water system, Alco. There, the district court only ordered implementation of the recommended improvements.

The district court's remedy allows the Appellants to control operations and service for approximately 90 percent of their original customer base in a very streamlined fashion, thereby "giving [Appellants] a clear opportunity to demonstrate that they can operate at least one water system in compliance with the law." *Alisal II,* 326 F. Supp. 2d at 1028. The Appellants themselves admit that most of the compliance problems occurred in the Small Utilities (other than Toro). The Appellants have proven through their service history and throughout this litigation that they were unable to manage effectively the several water systems in order to serve the public health. Simply put, they now have the opportunity to prove that they can safely manage just one.

The Appellants argue that letting them continue to own and operate Alco shows that the court was acting

inconsistently, but we think that it demonstrates that the district court was balancing the competing interests of the public and the Appellants, despite the egregious nature of their prior course of conduct. *Alisal II,* 326 F. Supp. 2d at 1028-29 (concluding that while full divestiture was fully justified, partial divestiture was a "less drastic remedy" and required under principles of equity). While other appropriate remedies are conceivable, our review is limited to whether the district court erroneously applied the law or acted irrationally in imposing the remedy it did.

We conclude that the Appellants' personal interests in maintaining ownership over the Small Utilities is substantially outweighed by the profound public interest at stake here. The regulatory violations that the Appellants committed were numerous and significant. They were entrusted with safeguarding the health and welfare of the thousands of individuals who rely on these water systems, and they have not effectively responded to the water quality problems. Furthermore, the record supports the district court's conclusions that the Appellants have acted in a manner inconsistent with an appreciation for the importance of their obligation to the public. We conclude the district court fashioned a rational remedy that fairly took into consideration the competing interests. There was no abuse of discretion in the means employed.

B

The Appellants assert next that the district court violated their due process rights by: (1) conducting the receivership bidding process in secret; and (2) improperly considering and giving weight to public comments and letters not part of the record, not taken under oath, and

not subject to cross-examination. However, the Appellants waived their due process claim regarding the receivership bidding process by failing to raise it in the district court. They state that they "repeatedly complained" that they were not being informed about the bidding and sales process. However, their only support in the record is that they once told the district judge that they did not know the status of the sales and requested additional information, and the court immediately ordered that the receiver make sales-related documents available as part of his duties.

This single evidentiary proffer is hardly evidence of repeated complaints. It does not demonstrate that the receiver willfully withheld information (or even that the Appellants had ever requested the information before or after that day). Additionally, it does not rise to the stature of a "due process" violation. Thus, the Appellants do not demonstrate through the record how their participation was unjustly limited, and we therefore will not consider the claim. *See, e.g., Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("We will not take up an issue not properly raised below unless necessary to prevent manifest injustice.") (citation omitted).

As to the public hearings, the Appellants argue that they were not allowed to "question" the process, but they did not object to the process as it occurred. On appeal, the Appellants admit they did not object to the district court's *holding* the public hearings, so this issue is waived. Nor did the Appellants object to the lack of evidentiary formality in conducting the hearings. No objections were timely raised that the speakers were not sworn and were not subject to cross-examination. However, they did object to the district court's *considering* the statements and letters

gathered through the hearing process in the divestiture proceedings, so this aspect of the claim is properly before us.

As the Supreme Court acknowledges, "due process" is difficult to define. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24-25 (1981). The process that is due varies according to the nature of the right and the type of proceedings. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (alteration in original). At its core, due process requires that a party have adequate notice and opportunity to be heard. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). In considering whether a district court accorded adequate due process, appellate courts "must look at the actual substance, not the name or form, of the procedure to see if the claimants' interests were adequately safeguarded." *SEC v. Elliott*, 953 F.2d 1560, 1567 (11th Cir. 1992) (discussing summary receivership proceedings and citing *SEC v. Wencke*, 783 F.2d 829, 836 (9th Cir. 1986)).

We conclude that there was no due process violation in the district court considering the information obtained through the public hearings. Importantly, there is no suggestion that the Appellants were denied the basic elements of due process – adequate notice and opportunity to be heard. This is not a situation where a party was unaware of an adverse proceeding or the district court denied a party forms of process to which they had expressly asserted a right. The Appellants were well aware of the contemplated hearing process and their counsel attended the hearings. There is no showing that they were

in any way limited in their ability to participate in the hearings or to refute any testimony presented, or that their interests were prejudiced or marginalized in this process. Accordingly, we do not see how the Appellants' due process rights were denied. *See Guenther v. Comm'r,* 939 F.2d 758, 760 (9th Cir. 1991) (explaining that a party's due process rights would be infringed if they were "unfairly prejudiced" by ex parte communication).

Although the form of this process was not typical for the courts, and we do not endorse such a practice in routine civil enforcement actions, the substance of the evidence adduced at the hearings is similar to that which could have been introduced by the government through affidavits or testimony. *See, e.g., FTC v. Amy Travel Serv., Inc.,* 875 F.2d 564, 576 (7th Cir. 1989) (holding that, where defendants were found to have committed deceptive trade practices in a nationwide telemarketing operation, the trial court did not abuse its discretion in admitting affidavits from consumers who had purchased travel vouchers from the defendants). In a case of this magnitude, directly affecting public health, evidence of the views of the individuals affected by the outcome was relevant to the district court's choice of remedy. The Appellants have pointed to no legal authority that would bar the district court from proceeding in a public-hearing forum and they did not timely object to proceeding in such a fashion. We recognize that "a district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad," *SEC v. Hardy,* 803 F.2d 1034, 1037 (9th Cir. 1986), and the hearing process was an efficient and direct way for the district court to consider the views of the interested

public, which had a manifest and significant stake in the proceedings.

Nor do the Appellants point to authority that would require the district court to conduct a remedy-phase hearing in the same manner or under the same evidentiary standards that it conducts a trial. In the context of a civil suit "cross-examination is not, in every instance, a sine qua non of due process. It all depends on the situation." *David v. City of Los Angeles*, 307 F.3d 1143, 1147 (9th Cir. 2002), *rev'd on other grounds*, 538 U.S. 715 (2003); *see U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1287 n.13 (11th Cir. 2001) (noting that "[o]f course, the Confrontation Clause is not applicable to civil cases"). In *Federal Trade Commission v. Figgie International, Inc.*, 994 F.2d 595 (9th Cir. 1993), for example, we allowed the district court to base its calculation of the maximum amount of redress for which the defendant might be liable on the agency's summation of 127 letters of complaint that it had received from private citizens. *Id.* at 608-09 (determining that admission of the letters fell into the residual hearsay exception).[7] Similarly, the district court here considered evidence of unsworn public comment not to demonstrate the violations that the Appellants committed, but for the limited purpose of fashioning a remedy for the violations.

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[7] The *Figgie International* court relied on its analysis of whether the complaint letters were admissible under the Federal Rules of Evidence. *See* 994 F.2d at 608-09. The Appellants have not raised such an argument here on appeal, although their "due process" claim could properly be characterized as an unpreserved challenge to the district court's admission of such evidence. Because the Appellants did not raise an evidentiary objection to the district court or on appeal, we consider it waived.

In concluding that there was no due process violation in this case, we also rely substantially on the fact that the Appellants' primary complaints against the evidence adduced at the public hearings – the lack of sworn testimony and cross-examination – are the direct result of their own failure to object to the district court holding such hearings and their failure to timely object to the manner in which the hearings were held and in which the evidence was introduced. They assert that they were "never allowed" to address the public letters and comments, but they fail to point out where in the record they ever asked to do so, despite the fact that counsel was present at the hearings. Had the Appellants timely objected to the proceedings or requested that the hearings be conducted in a more formal way, the district court could have modified the process and cured any potential defect. *See United States v. Odom,* 736 F.2d 104, 114 (4th Cir. 1984) (noting that "[i]t is well settled" that a party waives a challenge to failure to swear in a witness by failing to raise the point during the witness's testimony, when it could have been corrected).

We hold that the Appellants' due process rights were not violated by the district court's fashioning a remedy for regulatory violations by relying in part on evidence introduced through public hearings where: (1) the Appellants failed to object to the district court's conducting such hearings; (2) the Appellants failed to object to the witnesses' not being sworn or subject to cross-examination;

and (3) the Appellants failed on appeal to show how they were prejudiced by admission of the evidence.[8]

V

The Appellants argue next that the court-ordered sale of the Small Utilities was confiscatory because the sale prices realized were not indicative of their true value, and they seek just compensation under the Fifth Amendment's takings clause. The government points out that the takings clause issue was not raised below and should therefore be waived. In response, the Appellants contend that they raised a takings claim below in their comments to the Pierotti report. They cite to two places in the record. First, in the context of disputing the method of valuation, they argued before the district court only that "[w]here [they are] forced to sell the utility for less than its rate base, as the [r]eceiver recommends here, there is a taking that violates the Constitution." And second, they prefaced a feasibility argument with: "in light of the constitutional issues about confiscation. . . ." These are the only references to a takings claim in the record covering years of litigation.

These references were brief, conclusory statements made with no supporting legal argument and so are insufficient to preserve a takings claim for appeal. *See, e.g., Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996) ("To have been properly raised below, the argument must be raised sufficiently for the trial court to rule on it.")

[8] We emphasize that our holding is extremely narrow. Had the Appellants made timely objections to this unusual procedure or demonstrated prejudice, our analysis might be different.

(internal quotation marks and citation omitted); *Banks v. Rockwell Int'l N. Am. Aircraft Operations,* 855 F.2d 324, 326 (6th Cir. 1988) (holding that a "vague reference" to an issue before the district court was insufficient to preserve that issue on appeal). We therefore consider the Appellants' takings claim waived.

VI

The Appellants challenge the overall monetary penalty imposed on the basis that the district court did not consider the report of Dr. Berk that they submitted. The report challenged the valuation findings of the court-appointed accountant, Pierotti. The Appellants contend that Alco was substantially overvalued and that the resulting penalty was excessive. The substance of their argument is that the district court initially suggested that they would be allowed to object to the Pierotti report at the penalty hearing, but then had a "change of heart" and refused to consider the information.

The district court's decision to exclude expert testimony is reviewed for an abuse of discretion. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999). Prior to seeking to introduce Dr. Berk's report, the Appellants had already introduced an expert witness, Carl Danner, who testified as to valuation of the water systems. After reviewing the evidentiary proffer of Dr. Berk's report, the district court noted that when it said it would consider further evidence, it had expected evidence about "any changes in circumstances that might affect Mr. Pierotti's analysis." The court concluded that Dr. Berk's report was instead simply cumulative of the Danner testimony and "[v]iewed as a whole, Dr. Berk's opinions concern[ed] facts

known to and litigated by the parties at trial." *Alisal III*, 326 F. Supp. 2d at 1037.

The Appellants fail to show how Dr. Berk's report was new or different from the evidence they had introduced at trial, and thus they fail to show how the district court abused its discretion in dismissing the report as cumulative. We affirm the exclusion of the proffered evidence. The Appellants raise no other argument as to why the penalty was excessive and so we also affirm the penalty as imposed.[9]

VII

In its receivership order, the district court enjoined not only the named defendant individuals, Robert and Natholyn, but also their children, Thomas and Lynette, from "acquir[ing] any new interest, financial or otherwise,

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[9] The penalty imposed was well below the maximum penalty allowed by statute, which states, in part, that:

> [I]f the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of not to exceed $25,000 for each day in which such violation occurs.

42 U.S.C. § 300g-3(b); *id.* at § 300g-3(g)(3)(A). The Appellants committed 232 violations, many of which could be considered as extending over multiple days, which the district court concluded would result in a maximum civil penalty range from $17 million to $400 million. *Alisal III*, 326 F. Supp. 2d at 1035. The government argued that a penalty of $3 million to $5 million dollars was appropriate. As noted, the district court ultimately imposed a penalty of $500,000 with a $300,000 offset for the receiver's acceptance of bids that were not the highest bids on three water systems. *Id.* at 1038-39.

in any 'public water system' . . . without the express permission of [the] Court." *Alisal II*, 326 F. Supp. 2d at 1032. The Appellants do not claim that the substantive injunctive limitation is overly broad or otherwise challenge the scope of the injunction but argue that the injunction is simply not valid against Thomas and Lynette because they were not parties named in the lawsuit. The Appellants specifically seek a ruling that would invalidate the injunction under Federal Rule of Civil Procedure 65(d). However, we cannot reach this issue.

Although not specifically mentioned in Appellants' briefs,[10] Federal Rule of Appellate Procedure 3(c) requires the notice of appeal to:

> *[S]pecify the party or parties taking the appeal by naming each one in the caption or body of the notice,* but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X". . . .

FED. R. APP. P. 3(c)(1)(A) (emphasis added). Non-parties to the original action *may* appeal where they are "bound by the order from which they were seeking to appeal." *Devlin v. Scardelletti*, 536 U.S. 1, 8 (2002). But non-parties must also pass through the ordinary "jurisdictional threshold" of Rule 3(c), which requires that they be named in the notice of appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988). Moreover, the Appellants are bound by the ordinary time-constraints imposed upon parties and non-parties alike by Federal Rule of Appellate Procedure

[10] "Jurisdictional issues must be raised by this court *sua sponte*." *MacKay v. Pfeil*, 827 F.2d 540, 542 (9th Cir. 1987).

4(a)(1), which requires that a notice of appeal be filed within 30 days after judgment. *See* FED. R. APP. P. 4(a)(1).

Here, Thomas and Lynette were not named as defendants in the notice of appeal. The notice of appeal named the following defendants: Alisal Water Corporation; Toro Water Service, Inc.; North Monterey County Water Service, Inc.; Moss Landing Water Service, Inc.; Robert T. Adcock; and Natholyn P. Adcock. Because Thomas and Lynette were not included in the first notice of appeal, they were required to file a separate appeal within 30 days of judgment. They failed to do so. Moreover, it is not objectively clear from the notice of appeal that they intended to appeal. *Cf. Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1149 (9th Cir. 2003) (holding that when a party's intent to appeal is objectively clear, that party is not prevented from going forward under Federal Rule of Appellate Procedure 3(c)); *Simo v. Union of Needletrades, Indus. & Textile Employees*, 322 F.3d 602, 610 (9th Cir. 2003) (same). Consequently, we do not have jurisdiction to consider their challenge to the injunction.

VIII

We conclude that the district court had subject matter jurisdiction over this SDWA civil enforcement action and did not abuse its discretion or violate the Appellants' due process rights in fashioning the remedy imposed.

AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. ALISAL WATER CORPORATION, et al., *Defendants.*	Case No. C-97-20099 JF (EAI) MEMORANDUM OF INTENDED DECISION RE SALE OF RECEIVERSHIP ASSETS, OBJECTIONS TO LIQUIDATION ANALYSIS AND RELATED ISSUES (Filed Mar. 09, 2004)

By this Memorandum, the Court sets forth its intended disposition of two issues in the above-entitled action: the sale of eight water systems owned by Defendants and subject to the receivership created by the Court on June 26, 2002[1], and the adequacy of the liquidation analysis requested by the Court and counsel to aid the Court in fixing an appropriate civil penalty. The Memorandum also addresses several procedural and case management issues raised by Defendants. The Court has read

[1] The systems are Toro Water Service, Inc.; Moss Landing Water Service, Inc.; North Monterey County Water Service, Inc ("Normco").; Blackie Road Water System # 18; San Jerardo Water System; Vierra Canyon Water System; Langley/Valle Pacifico Water System; and Buena Vista Water System.

and considered the pleadings and comments submitted by the Receiver and counsel for the parties, the oral arguments of counsel at the hearing on January 21, 2004, and public comment received at and following special hearings in Salinas, California on August 14, 2003 and December 17, 2003.

1. Sale of Water Systems.

The Court will direct the Receiver to sell Toro Water Service, Inc. to California American Water Company for the sum of $408,000 and the Buena Vista Water System to California Water Service Company for the sum of $300,000. The Receiver will be directed to sell the remaining water systems to the Pajaro/Sunny Mesa Community Services District (PSMCSD) pursuant to the terms of PSMCSD's bids for those systems.

The sale prices for Toro Water Service, Inc. and the Buena Vista Water System represent the highest bids received for these systems, and the Court is satisfied that the bids are commensurate with the fair market value of the systems. With the exception of the Normco system and the Moss Landing Water Service, the sale prices for the remaining systems also represent the highest bids submitted to the Receiver; though they are somewhat minimal, the Court finds that the bids reflect the physical condition of the systems and the magnitude of repairs necessary to avoid future instances of non-compliance with applicable law and thus also appear to be reasonably commensurate with fair market value.

As to the Normco system and the Moss Landing Water Service, the Court concludes that although the bids submitted by the PSMCSD are not the highest bids received,

the public interest nonetheless would be best served by sale of these systems to the PSMCSD and that in this instance the public interest significantly outweighs the interest of the receivership in obtaining the highest sale price. The factual record in this case reflects that the customers of these systems have suffered substantial inconvenience and risk to their health for many years as a result of the present operators' non-compliance, and the Court gives great weight to their views concerning the future of the systems. Those views, as evidenced by letters, petitions and oral comments at the two special hearings, overwhelmingly favor sale of the systems to the PSMCSD, a non-profit public agency. The record establishes that the PSMCSD is capable of operating the systems effectively and in compliance with the law. To the extent that the proceeds of sale are less than would be realized by sale to the highest bidder or reflect sale for less than fair market value, the Court can and will consider this fact in determining the civil penalty to be paid by Defendants.

2. Liquidation Analysis.

Pursuant to an order dated May 27, 2003, in consultation with counsel and with the consent of the parties, the Court appointed Richard L. Pierotti and the accounting firm of Kokjer, Pierotti, Maiocco & Duck, LLP to determine the liquidation value of assets owned by Defendants. The principal purpose of this reference was to enable the Court and counsel to evaluate the ability of the Defendants to pay a civil penalty. The Court has carefully reviewed Mr. Pierotti's report and has considered both written [sic] the written objections submitted by Defendants and the comments on Defendants' behalf by their counsel at the hearing on January 21, 2004. Bearing in mind that the

purpose of Mr. Pierotti's analysis was not to fix the actual sale price of any asset but rather to provide the Court with a professional assessment of Defendants' overall financial condition, the Court finds the analysis to be reasonable and not clearly erroneous.

3. Procedural Issues.

The individual defendants claim that they are entitled to an evidentiary hearing with respect to certain aspects of Mr. Pierotti's analysis with which they disagree. They cite no authority for this proposition. Ordinarily, references for purposes of an accounting are governed by F.R.Civ.P. 53, under which the referee's findings are reviewed for clear error. All parties have had the opportunity to file objections and offer comments with respect to Mr. Pierotti's report and the Court also held a hearing at which arguments concerning the report were received. Defendants will have yet another opportunity to comment on the weight to be given to the report when the Court hears the parties' presentations with respect to civil penalty.

The individual defendants also suggest that this Court's proceedings somehow have been and continue to be compromised by orders of the Monterey Superior Court in the Silverwood litigation. As the government points out in its reply brief, neither the Receiver nor the government as plaintiff in this action is aware of any specific instance that justifies this concern. The state court order is explicitly limited to assets not subject to the receivership in the instant federal action. There is no question that the state court proceeding may impact the liquidation value of the Alco Water System, Defendants' major asset and the only defendant water system not subject to sale by this Court's

receiver. In the event that were to occur, however, Defendants simply would have less ability to pay a penalty in this action, and this Court necessarily would consider that fact in determining the amount of the penalty.

Finally, the trust defendants for the first time assert the argument originally made by the individual defendants that the government lacks standing to bring this action and that this Court accordingly lacks jurisdiction. Even assuming that the trust defendants are not collaterally estopped from making this assertion, which is far from clear, the Court concludes that it is without merit for the reasons set forth in its published order addressing the standing issue. *United States v. Alisal Corp.*, 114 F.Supp2d 927, 932-33 (N.D. Cal. 2000).

4. Case Management Issues.

Defendants suggest that in light of the outcome of the bidding process, Mr. Pierotti's analysis and their allegedly improved compliance with applicable law and regulations since the time of trial, the Court should consider revisiting the question of whether the small water systems, should be sold at all. As the Court observed at the hearing on January 21, 2004, it is apparent that Defendants have misunderstood the Court's intentions. The Court indicated at the time it created the receivership and ordered the sale of the small water systems that it would reconsider the terms of its order if "unbundling" the small water systems from Alco made sale of the small systems impracticable or if Defendants failed to comply with the Court's directives regarding the management of Alco, in which case it would consider ordering a divestiture of *all* water systems operated by Defendants, *including* Alco. As neither of

these contingencies has occurred, there is nothing to revisit.

In a similar vein, Defendants suggest that the Court refer this entire matter to a mediator for the purpose of resolving all outstanding issues. As the parties are aware, this Court, with the consent of all parties, supervised extensive settlement negotiations at or near the time of trial in December 2001. This Court's Memorandum of Intended Decision following that trial provided the parties with additional proposals and opportunities relative to settlement. In each instance, despite overwhelming evidence of their non-compliance with applicable law, Defendants expressed little or no interest in any resolution that would limit or diminish their control of the subject water systems. While it would not stand in the way of voluntary discussions among the parties, the Court will not order unwilling parties to participate in further settlement discussions in this case, and the government has made it clear that it would be an unwilling participant in any such discussions at the present time.

In light of the foregoing, it appears that the only remaining step necessary to conclude the instant litigation is a hearing to determine an appropriate civil penalty. Counsel shall meet and confer as to mutually convenient dates and obtain a date from the Court's judicial assistant.

Counsel for the government is requested to prepare a formal order consistent with this Memorandum.

DATED: 3-9-04

/s/ Jeremy Fogel
JEREMY FOGEL
United States District Judge

326 F.Supp.2d 1010

United States District Court,
N.D. California,
San Jose Division.
UNITED STATES of America, Plaintiff,
ALISAL WATER CORPORATION, et al., Defendants
No. C97-20099 JF(EAI).

April 9, 2002.

Lori Jonas, Matthew Fogelson, Environmental Enforcement Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC, for Plaintiff.

Marc P. Fairman, Law Offices of Marc P. Fairman, San Francisco, CA, for Adcock Defendants.

S. Gary Varga, Monterey, CA, for Trust Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FOGEL, District Judge.

I. INTRODUCTION

Trial in the above-entitled action commenced on December 4, 2001 and concluded on January 8, 2002. On February 7, 2002, the Court issued its Memorandum of Intended Decision outlining its proposed disposition of this matter. Having reviewed Plaintiff's proposed findings of fact and conclusions of law and Defendants' objections thereto, the Court now sets forth the factual and legal basis for its Order Appointing Equitable Receiver contemplated by the Memorandum of Intended Decision and

issued simultaneously herewith. Issues related to civil penalty, which will be the subject of further proceedings, will be the subject of a future Memorandum

This case, originally filed in January 1997, arises under the federal Safe Drinking Water Act ("SDWA" or the "Act"), 42 U.S.C. §§ 300f, et seq., and its regulations. The operative complaint alleges violations of the SDWA by corporate defendants Alisal Water Corporation; Toro Water Service, Inc.; North Monterey County Water Service, Inc.; Moss Landing Water Service, Inc. (collectively, "Alisal"); and individual defendants Robert T. and Natholyn P. Adcock at nine drinking water companies in Monterey County, California. The corporate defendants are public water systems which are owned, operated or controlled by Mr. and Mrs. Adcock. Their son, Tom Adcock, currently is responsible for the day-to-day operations of the water systems. Trial Transcript ("Tr.") at 1552.

On August 23, 2000, the Court granted summary judgment establishing defendants' liability with respect to nine separate causes of action encompassing hundreds of individual violations of the Act occurring in the 1990s. *United States v. Alisal Water Corp. et al.*, 114 F.Supp.2d 927 (N.D.Cal.2000). Specifically, the Court found that Defendants failed to meet the Maximum Contaminant Level ("MCL") for microbiological contaminants, failed to report or give public notice of the MCL failures, failed to do required repeat and increased routine monitoring, failed to report the lack of repeat and increased routine monitoring as required, failed to retain documents as required, and failed to test for lead and copper in their water in a timely manner. Many of the violations found by

the Court involved intentional false reporting or non-reporting. *Id.* at 932.[1] On November 8, 2001, the Court granted summary judgment establishing the liability of the corporate defendants with respect to three additional causes of action alleging further violations of the MCL for total coliform during 2000-01. The trial addressed the appropriate remedy for the adjudicated violations.

The Safe Drinking Water Act provides that a court may enter "such judgment as protection of the public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies." *See* 42 U.S.C. § 300g-3(b). As set forth herein, in light of all the evidence presented at trial and upon review of the applicable law, the Court concludes that significant equitable relief, including the appointment of a receiver for certain specified purposes, is warranted in this case.

II. DISCUSSION

A. *The Law of Receivership Supports the Imposition of Such a Remedy in this Case*

The appointment of a receiver "represents a judicial determination that the operator of an organization may be unwilling or incapable of acting in good faith toward compliance with a judgment.... The receiver ensures certainty in the execution of a court's order." Stuart P. Feldman, *"Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation,"* 18 B.C. Envtl. Aff. L.Rev. 809, 828 (1991) ("Feldman"). The authority of a

[1] The Court's prior opinion sets forth the citations for the various regulations violated. 114 F.Supp.2d at 932 n. 2.

court of equity to impose a receivership on a chronic violator of public health laws is "founded in the broad range of equitable powers available to [a] court to enforce and effectuate its orders and judgments." *United States v. City of Detroit,* 476 F.Supp. 512, 520 (E.D.Mich.1979).

A receivership is particularly appropriate where public health issues are implicated. As one court explained in appointing a receiver to run a waste disposal facility, there are "differences between the type of business in which the respective Defendants are involved and that of the ordinary private corporation or enterprise." *Ohio v. Chem-Dyne, Inc.,* 1980 WL 6204, 10 ELR 20387 (Ohio Com.Pl., Feb. 1, 1980), *aff'd in part, rev'd in part on other grounds,* 1981 WL 5234 (Ohio App. Oct. 28, 1981). Specifically, the court noted that "the Defendants in this case are engaged in a business that definitely affects the entire community and conceivably the water for this entire area. . . . [Defendant] is engaged in businesses that very definitely have a widespread effect on community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court." *Id.*

Accordingly, several state and federal courts have imposed receiverships on environmental violators, including owners and operators of public drinking water systems. *See, e.g., United States v. Alder Creek Water Co.,* 1984 WL 178394, 14 ELR 20430 (D. Or. April 23, 1984) (receiver appointed in SDWA case after defendant "failed to comply with a court order to lessen the health risks posed by [defendant's water systems], and to comply with the Act's reporting and monitoring requirements"), *aff'd,* 823 F.2d 343 (9th Cir.1987); *United States v. Acadiana Woods Add. # 2 Sewer Co.,* 41 F.Supp.2d 632 (W.D.La.1999) (receiver appointed to run defendants' sewage treatment

plants to secure compliance with CWA); *City of Detroit,* 476 F.Supp. 512 (administrator appointed to run City's wastewater treatment plant to obtain compliance with CWA); *see also Town of Greenwich v. Dep't of Transp.,* 1979 WL 30063 (D. Conn. Nov. 7, 1979); *Ohio v. Chem-Dyne Corp.,* 1981 WL 5234; *Dep't of Envtl. Prot. v. Emerson,* 563 A.2d 762 (Me.1989).[2]

Courts appointing receivers focus on defendants' actual ability to manage their facilities in compliance with the law. As the district court noted in *City of Detroit* in appointing a receiver to run the city's sewage treatment plant, "[p]resent management is consumed by the demands of crisis operating conditions that command priority over personnel, planning, budgeting, process evaluation, and

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[2] Although in each of the cited cases a receiver was appointed only after the defendant had violated a court order requiring compliance, "there seems to be no reason . . . for a rigid rule requiring as a prerequisite that injunctive relief have been attempted and have failed." Comment, "Court-Created Receivership Emerging As Remedy For Persistent Noncompliance With Environmental Laws," 10 ELR 10059 (1980) ("Comment"). Rather, where public health is sufficiently at risk, "courts should be prepared to turn to receivership without the formality of waiting for an injunction to be disregarded." *Id.* Another commenter has similarly suggested that "[t]here is no compelling reason . . . for a court to wait until severe environmental harm has transpired or a defendant has flouted statutes and consent decrees before the court exercises the full scope of its equitable power. In the face of likely dangers to the . . . public welfare, a court may choose initially and immediately to place an entity under receivership." Feldman, 18 B.C. Envtl. Aff. L.Rev. at 832. *Cf. United States v. Midway Heights County Water Dist.,* 695 F.Supp. 1072, 1076 (E.D.Cal.1988) ("This court need not wait to exercise its authority [to issue an injunction] until water district customers have actually fallen ill from drinking Midway Heights water"). In any event, as is set forth below, Defendants in this case have demonstrated a chronic pattern of resistance to and noncompliance with governmental efforts to regulate their corporate behavior, although this Court itself has not issued an injunction.

other administrative functions. As with other problems at the plant, this situation feeds on itself[.]" *City of Detroit,* 476 F.Supp. at 517-18 (quoting consultant's report). The court also focused on defendant's failure to train staff adequately, and to submit a continuing training program to regulators. *Id.* at 517. The district court in *Acadia Woods* also relied in part on defendants' failure to have "sufficient numbers of properly trained personnel to operate or to adequately maintain their sewage treatment plants." *United States v. Acadia Treatment Systems,* 41 F.Supp.2d 632, 633 (W.D.1999).

Courts also have focused on a defendant's financial ability to comply. In appointing a receiver to run defendants' sewage treatment plants in *Acadia Woods,* the court found compelling the fact that "[n]either the named defendants in this proceeding nor any subsidiary corporation or corporations or officers thereof have the financial ability to conduct the current business of defendants in an environmentally sound manner to protect the public health or to secure the necessary capital from a lending institution to do so." *Acadia Woods,* at 634.

A court order appointing a receiver and divesting a defendant of water companies that are non-compliant appears to be well within the scope of remedies contemplated by Congress in enacting the SDWA. The legislative history of the SDWA's enforcement provision, Section 1414, expressly states that "courts which are considering remedies in enforcement actions under this section are not to apply traditional balancing principles used by equity courts. Rather, they are directed to give utmost weight to the Committee's paramount objective of providing maximum feasible protection of the public health. . . ." H.R.Rep. No. 93-1185, 93d Cong., 2d Sess., reprinted in 1974

U.S.Code Cong. & Admin. News, 6454, 6476. Moreover, Congress expressly contemplated that some small companies might not be able to comply and would be forced out of business. The legislative history provides:

> It is evident that what is a reasonable cost for a large metropolitan (or regional) public water system may not be reasonable for a small system which serves relatively few users. The Committee believes, however, that the quality of the Nation's drinking water can only be upgraded if the systems which provide water to the public are organized so as to be the most cost-effective. In general, this means larger systems are to be encouraged and smaller systems discouraged.

H.R.Rep. No. 93-1185, 93d Cong., 2d Sess., reprinted in 1974 U.S.Code Cong. & Admin. News 6454, 6470.

The evidence presented at trial convinces the Court that the imposition of some form of receivership on the defendant water systems is unavoidable in this case. As set forth below, the adjudicated violations are serious and include falsification of records designed to protect public health; Defendants have a long history of such violations and others; Defendants have adopted an inordinately combative stance against legitimate regulatory oversight and have maintained that stance for more than a decade; Defendants repeatedly have failed to accept responsibility for their conduct, seeking instead to shift blame to others including the regulators themselves; Defendants lack the managerial competence to operate compliant drinking water systems; and Defendants lack the financial wherewithal to operate compliant drinking water systems. In light of these findings, the Court concludes that "the usual remedies are inadequate" and that some form of receivership is

necessary "to get the job done." *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir.1976) (affirming appointment of receiver in non-environmental context).

B. *The Evidence Demonstrated That the Violations of the Act Found by the Court Were Indeed Serious*

1. The Violations Undermine the SDWA

Since the overwhelming majority of drinking water systems are never sampled by an independent party, self-monitoring and truthful reporting are critical to the success of the Act in that they represent the only way for the government to determine if a drinking water supply system is safe. *In the Matter of ANTHONY J. TAYLOR*, 1992 WL 293140 (E.P.A.1992). The former head of EPA Region IX's drinking water program, William Thurston, confirmed this, testifying that self-monitoring by water systems is the primary way that regulators and the public know about the quality of water. Tr. at 54. As the court in *United States v. City of North Adams*, 1992 WL 391318, *2, noted: "neglect in taking and testing water specimens is tantamount to closing one's eyes to possible water-supply contamination." The court there held that failure to monitor and analyze drinking water samples was a serious violation. *Id.*

In this case, Defendants not only failed to monitor and report results of water samples, but also reported numerous *false* results, at best with gross negligence and at worst with conscious intent to deceive. Defendants continue to fail to monitor for lead and copper, as required by law. Tr. at 954-55. Such falsifications and failures to report were not isolated incidents. In addition to the failures to

report and falsifications adjudicated by this Court on summary judgment, the evidence at trial included proof of even more falsifications. William Ray, an investigator for the State of California's Environmental Laboratory Accreditation Program, testified that documents found at Alisal's testing laboratory tended to support positive sample results, not the negative results reported by Alisal to regulators in the mid-1990s. Tr. at 321. Mr. Ray further testified that Alisal submitted laboratory results showing that approximately fifty analyses had been performed, while the supporting documentation provided by the testing laboratory demonstrated that only a fraction of the reported constituents had been sampled for. Tr. at 324-38. In one instance, incredibly, Alisal claimed some fifty results for a sample that did not even exist. *Id.*

The evidence at trial also gave reason for concern that such falsifications may be continuing. James Hively of the Monterey Bay Aquarium Research Institute (MBARI), a customer of Defendants' Moss Landing system, testified that he sampled for nine months in 2000 at the Moss Landing system and obtained numerous coliform positive results from both within and outside of MBARI. Tr. at 355-74. At the same time, Alisal reported uniformly negative samples for the system to regulators. Plaintiff's Trial Exhibit ("Pl.Exh.") 106. Alisal's results for the Vierra Canyon system also were clean during this time period. *Id.* Yet, once the Monterey County Health Department ("MCHD") got involved, it found widespread contamination at both systems. Tr. at 435-37; 476-77. This contamination led to boil water orders for both systems. Only at this point did defendants' results begin to show contamination. *See* Exh. 3, 5 to Decl. of Cheryl Hall (10/1/01).

Although they object to the Court drawing any adverse inferences from these facts, Defendants offered no credible innocent explanation at trial for the inconsistent results. Several explanations are possible, but none of them reflects favorably on Defendants. Either Defendants' samples or their supporting documentation were tampered with, the water tested was not drawn properly from the subject systems or some type of incompetence or mistake led to inaccurate results. The government's expert, Gene Reade of the State Department of Health Services ("DHS"), questioned expressly the accuracy of the Moss Landing results, Tr. at 1112-13, as did Cheryl Hall of the MCHD. Tr. at 907. Mr. Reade was even more critical with respect to the results from the Vierra Canyon system, stating that he could not understand, given the extreme state of disrepair of the system (one of the worst he has seen), how the system did not produce a single positive coliform result for years prior to the boil water order. Tr. at 1123, 1141. The Court found Mr. Reade's testimony credible.

Defendants' unlawful and, at times, unscrupulous behavior clearly undermines the Act, and, in fact, hardly could do more damage to it. Accordingly, the Court finds that the violations are serious. *See United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 348 (E.D.Va.1997), *aff'd in part, rev'd in part,* 191 F.3d 516 (4th Cir.1999) ("When a permittee falsifies DMRs [pollution monitoring reports], fails to maintain supporting records, or destroys records, the permittee may be covering up serious violations of effluent limitations. . . . Since the Clean Water Act relies on self-reporting of permittees, such violations undermine the Act and are considered serious . . . "); *Hawaii's Thousand Friends v. City & Cty. of Honolulu,* 821 F.Supp. 1368,

1384 (D.Hawai'i 1993) (noting that the failure to report is more significant than the violation because it deprives the regulatory agency critical opportunity to investigate and rectify the situation).[3]

2. The Violations Have Had a Serious Impact on Users

The violations in this case also are serious in terms of the toll they have taken on Alisal's users. The customers of the Moss Landing system were subject to a five-week boil water order in 2000 because of the widespread contamination present in that system. Tr. at 439, 469. Those customers included residences, educational facilities, restaurants and live-aboard boats. Tr. at 429-32. At the time of trial, customers of the San Jerardo system were using bottled water for all consumption needs as a result of nitrate contamination. Tr. at 1865. Although clearly a major inconvenience for these individuals, the plight of the Moss Landing and San Jerardo customers pales in comparison to that of the customers of the Vierra Canyon system who were forced to boil their water for ten months in 2000-01. Tr. at 909, 940.

The Court heard testimony from Carl Chase, a customer of the Langley Valle/Pacifico system, that the water

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[3] The critical importance of timely and accurate self reporting has been highlighted and emphasized in a number of SDWA cases. *See, e.g., United States v. Neskowin Enterprises, Inc.*, 10 Envtl. L. Rep. 20622, 20626, 1980 WL 98393 (D.Or. June 3,1980); *In re Sunbeam Water Co.*, Docket No. 10-97-006, 1999 WL 1013077, 1999 EPA ALJ LEXIS 79 at *25 (October 28, 1999); *In re: Leisure Valley West et al.*, Docket No. SDWA-III-023 et al., 1999 WL 504717, 1999 EPA ALJ LEXIS 53 at *14 (June 25, 1999).

provided by Defendants on at least one occasion burned his daughter's skin and was deemed undrinkable by his family. Tr. at 695, 686. There also was evidence that Defendants' water, when it actually was being provided and had adequate pressure, caused gastrointestinal distress and had strange colors and odors, and that these conditions persisted for more than a year in the case of the Langley system and for long periods at Vierra Canyon, Buena Vista, and Alco. Pl. Exh. 70, 71, 162-69, 170-76; Tr. at 634-35, 709, 424, 508, 942, 676; 30(b)(6) Depo. of Alisal et al. (11/3/98) at 30-34, 54.

3. The Violations Pose a Serious Threat to Public Health

Defendants' actions posed a serious health threat because they resulted in the provision of water that repeatedly failed the MCL for total coliform. *See* 114 F.Supp.2d at 932. Failure of this MCL has been deemed serious by a number of courts. *City of North Adams,* 1992 WL 391318, *1-2 ("MCL violations for coliform bacteria are particularly grave . . . the presence of coliform is an indicator of the potential existence of pathogens in water . . . These intestinal microbiological organisms pose a keen threat to persons, especially the young or the elderly, who ingest them. . . . Although plaintiff documented no mass outbreaks of illness, the enhanced risk of disease sufficiently demonstrates the gravity of the coliform MCL violations."); *see also United States v. Midway Heights County Water Dist.,* 695 F.Supp. 1072, 1076 (E.D.Cal.1988); *Neskowin Enters., Inc.,* 1980 WL 98393, 10 Envtl. L. Rep. at 20626.

The government submitted the testimony of Dr. Paul Berger, a toxicologist. Dr. Berger's testimony indicates that the presence of total coliforms is a good indicator of

the vulnerability of a system to bacterial and other viral pathogens in a water supply. Written testimony of Paul Berger at ¶ 14. Defects in a system's integrity that allow total coliforms to live also allow for the entrance of fecal pathogens, which cause any number of diseases. *Id.* In Dr. Berger's opinion, the data in this case suggest that the Alco, Moss Landing and Vierra Canyon systems were and may still be vulnerable to fecal pathogens. *Id.* at ¶ 19. Moreover, the absence of evidence demonstrating actual illness is not proof that such illness did not occur. *Id.* at ¶ 20.[4] According to the literature relied upon by Dr. Berger, waterborne disease is greatly underreported for a variety of reasons, and an incidence of waterborne disease may occur even without a community's knowledge. *Id.* at ¶¶ 20-22. As this Court has found, instead of re-sampling and/or treating water that tested positive for total coliform, or informing health department officials who could take appropriate action, Defendants simply failed to report positive results or falsely reported instead that the water was safe. 114 F.Supp.2d at 932. Users thus were put at additional risk.

Further, Defendants failed to sample their water for lead and copper contamination when they were required to do so, *id.* at 936, and thus obtained no data which could be used to determine if users were at risk from excess lead and or copper between 1994 and 1998. When such sampling finally was undertaken in 1998, the copper action level was exceeded at NORMCO and Vierra Canyon. Pl. Exh. 83. This is a potentially serious health issue. As the government's expert, Dr. Paul Mushak, testified, copper is

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[4] In fact, there was evidence of complaints of gastrointestinal distress from Moss Landing users. Pl. Exh. 70, 71.

associated with acute and chronic effects, and copper at the levels found in Defendants' water poses an unacceptable risk of liver damage in infants. Tr. at 718-29.

The seriousness of the violations was exacerbated by Defendants' repeated letters to their customers containing misleading information, including letters indicating that samples were free of coliform when in fact the samples contained high levels of chlorine that likely masked the presence of coliform. Tr. at 445-47; 453-54; 501. Defendants added to a potentially dangerous situation at the Moss Landing and Vierra Canyon systems by publishing a letter to their customers in the local newspaper in September 2000. Pl. Exh. 209. The letter intimated that the water in those systems was safe, even though Boil Water Orders were then in effect at the systems. Customers' health could have been at risk if the customers believed the misstatements and thus did not comply with the Boil Water Orders.

4. Defendants Presented No Compelling Counter-Evidence Regarding Seriousness of the Violations

Defendants did not produce any compelling evidence to contradict a finding that the violations are serious. Indeed, Tom Adcock conceded that many of the violations were in fact serious. Tr. at 1899-1901. As to certain months in which positive coliform samples were omitted from reports submitted by Defendants to State regulators, Defendants offered the explanation that perhaps these results were received late by the water systems. Tr. at 1450. In addition to the fact that there is no evidence supporting this theory, the explanation is no defense at all. If, after it submitted its monthly report, Alisal learned

that in fact it had a number of positive coliform sample results, it had an obligation to amend its report. It failed to do so. The reasonable inference is that the reports were intentionally falsified, or at best that Defendants knowingly permitted inaccurate reports to remain uncorrected.

As to the potential impact of their conduct on public health, Defendants assert that the amount of copper in drinking water sanctioned by EPA essentially is too protective of human health and that copper levels above the EPA limit are not harmful. Tr. at 835. However, the studies upon which their expert, Dr. Becking, relies are not generally accepted in the United States, and Dr. Becking's opinion recently has been rejected by the National Academy of Sciences. Tr. at 835, 836-39. As to the many positive coliform samples, defendants offer nothing other than their view that the absence of fecal or *e coli* contamination shows that the violations were not serious. This claim is contradicted by Dr. Berger's unrebutted expert testimony.

C. *The Evidence Demonstrated that Defendants Have a Long History of Violations*

The evidence at trial offered voluminous, detailed proof of Defendants' fifteen year history of non-compliance with drinking water laws and regulations. Although Defendants showed that most of the reporting violations adjudicated by the Court occurred in the early 1990's and that their record of compliance in this respect improved beginning in late 1994, the government established that reporting violations, inaccurate test results and unreasonable delay in addressing incidences of contamination characterized Defendants' management of the water companies through and including the time of trial.

In its order granting the government's first motion for summary judgment, this Court found violations by Defendants of the Total Coliform Rule ("TCR"), 40 C.F.R. Part 141 (various sections), beginning in 1991. 114 F.Supp.2d at 932. In its order granting the government's second motion for summary judgment approximately a year later, the Court found that there were additional violations of MCL for total coliform even after summary judgment was granted. Nov. 8, 2001 Order at 5.[5] Defendants had actual knowledge no later than 1993 of the regulation requiring them to sample their drinking water for the presence of lead and copper, when they received a Notice of Violation from EPA with regard to the Alco system. Tr. at 1858. Nevertheless, most of Defendants' systems did not test for lead and copper until 1998. *See* 114 F.Supp.2d at 936. Defendants admit they only did so on advice of counsel. 30(b)(6) Depo. of Alisal, et al. at 79.

In addition to the violations adjudicated on summary judgment, there was evidence at trial of the following: in 1986, Alco failed to do required routine and repeat sampling (Pl.Exh. 1); in 1987, it still failed to submit required sampling (Pl.Exh. 2); in 1990, both Alco and Toro failed to submit routine sample results as required (Pl.Exh. 7, 8); in 1990 and 1991, both Alco and Toro failed to distribute their annual water quality reports as required (Plaintiff's Exh. 9, 11, 12); beginning in 1989 and through 1993, both Alco and Toro failed to monitor for organics, inorganics, minerals and radioactivity (Tr. at 120-23); in 1990, neither Moss Landing nor Blackie Road tested for coliform as required (Pl.Exh. 68, 69); in 1990, San Jerardo had coliform

[5] The November 8, 2000 Order addressed the 2000-01 MCL violations at Moss Landing and Vierra Canyon.

in its water as found by the County (Pl.Exh. 72, 73); Wildwood's water also showed coliform in 1990 (Pl.Exh. 74); in 1991 and 1994, Vierra Canyon's water showed coliform as found by the County (Pl.Exh. 75, 77); in October 1993, Toro failed to submit its monthly bacteriological samples (Pl.Exh. 31); in 1995, the County issued a Compliance Order to Langley Valle/Pacifico for failure to provide continuous, wholesome and potable water (Pl.Exh. 79); in 1995, Toro failed to take repeat samples within the time required by law (Pl.Exh. 40); in 1995, Wildwood failed to do required follow up sampling (Pl.Exh. 107); in 1995, Defendants exceeded the allowable number of connections at Alco and Toro (a problem that has been ongoing at Alco since September 2000) (Pl. Exh. 41; Tr. at 188-90); and in 1996, the County again ordered Langley Valle/Pacifico to address its water quality problems (Pl.Exh. 81). From 1994 until the summer of 1998, Defendants were in continuous non-compliance with the lead and copper rule. *See* 114 F.Supp.2d at 936. Moreover, as Cheryl Hall of MCHD testified, Defendants are again behind on lead and copper testing for almost all of their systems, despite this Court's August 2000 Order finding Defendants liable as to Count Nine of the operative complaint, which alleges violations of the lead and copper rule. Tr. at 954-55.

Defendants' history also is notable for ongoing customer complaints about water quality: in 1990, people at Moss Landing complained about stomach problems (Pl.Exh. 70, 71); in 1993, customers at Pine Canyon complained about water quality (Pl.Exh. 76); in 1995, people at Vierra Canyon also complained about water quality (Pl.Exh. 78). As Carl Chase testified, his group of homeowners complained about water quality at Langley/Valle Pacifico from 1995 until early 1997, and again

from the summer of 2000 to the summer of 2001. Pl. Exh. 162-69; 170-76. From 1994 to 1998, the County received an unusually high volume of complaints from the users at Buena Vista about water quality, water outages and water pressure. Tr. at 634-35.

The history of non-compliance continued through the late 1990s. In July of 1998, Elizabeth Karis of the MCHD advised Moss Landing to implement a cross control prevention plan to prevent the entrance of contaminants into the domestic supply. Pl. Exh. 109. As numerous witnesses testified, this still was not done by the summer of 2000, perhaps causing the Moss Landing boil water order. *See, e.g.,* Tr. at 451-52. When the County went to look for records of the cross connection plan in 2000, for the most part such records did not exist. Tr. at 644. Additionally, in December 1999, the Vierra Canyon system failed the MCL for iron. Pl. Exh. 99. Defendants' violations of primary drinking water standards continued even during the pendency of the trial: Alisal failed the MCL for total coliform at San Jerardo in December 2001. Pl. Exh. 224, 225.

D. *Defendants Have a Demonstrated History of Combativeness with Regulators*

Perhaps the most vexing aspect of this case from the Court's point of view is the manner in which Defendants have interacted with regulatory agencies over the past decade. While regulators make mistakes, and any person or entity subject to governmental regulation has the right to disagree with regulators and seek legal redress when it is appropriate to do so, Defendants conduct, as discussed above, reflects a persistent pattern of non-compliance with the most basic responsibilities of a public utility. Accurate,

timely testing and reporting and a prompt, effective response to unsafe conditions hardly are too much to ask of a provider of public drinking water.

As the evidence at trial demonstrated, Defendants typically made little or no effort to comply when their inadequate performance was pointed out to them. Rather, State and County regulators devoted years in fruitless efforts to obtain better performance from the companies.[6] Cathy Ma of the DHS testified to repeated reminders to the companies that they needed to take routine bacteriological samples monthly, the most basic aspect of the Act's monitoring regime. Pl. Exh. 1, 2, 7, 8, 21, 31. There was similar evidence of the defendants ignoring repeated reminders to prepare and distribute annual reports to consumers and conduct chemical testing on their wells. Pl. Exh. 9, 11, 12, 15, 16, 17, 18, 22, 23. Indeed, Ms. Ma testified that in the early 1990s, the State spent on average ten hours per year on enforcement-related activities for large systems. Tr. at 193-95. In contrast, it spent hundreds of hours on enforcement activities for Alco and Toro in those years. *Id.*

The evidence with regard to the small, County-regulated systems is the same. Mary Ann Dennis of MCHD testified that even prior to 1990, it was very difficult to work with Defendants. Tr. at 404. They often

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[6] In California, the State DHS is the agency with primary enforcement responsibility with respect to public water systems. The DHS in turn has agreements with local primary agencies ("LPAs") under which the LPAs enforce the SDWA as to certain public water systems. One such LPA, the MCHD, has primary enforcement responsibility with respect to some of the water systems at issue in this action while the DHS retains primary enforcement responsibility with respect to others. 114 F.Supp.2d at 930.

failed to follow through on promised actions, and the County received a high volume of complaints about the companies. *Id.* Further, as Ms. Dennis and Cheryl Hall testified, Defendants' record in this regard has not improved. Tr. at 512, and generally 890-940.

Rather than comply with directives from regulators, Alisal's overarching regulatory philosophy has been to litigate when challenged and to give no ground. Consequently, Alisal has chosen to file several petitions for writ of mandamus strenuously opposing various citations issued by the State and County. At least some of the arguments in support of these petitions appear hypertechnical or even frivolous. Norman Knoll, counsel to DHS, testified that Alco filed three writ petitions against the State regarding three citations issued in 1993. Written testimony of N. Knoll at 3. The directives in these citations are so minimal that a company interested in compliance easily could have complied and tried to do better in the future. Pl. Exh. 21, 22, 23. Yet, rather than comply and devote itself to providing safe water, Alisal chose to fight, thus setting in motion the current lawsuit. Tr. at 172.

The same approach of litigation rather than cooperation can be seen by examining the citation by the County regarding the 2000 Moss Landing incident. Pl. Exh. 96. The directives are minimal: hire an independent sampler; have the lab send copies of results directly to the County; submit a report regarding the cause of the contamination; implement a cross connection control plan; cease adding unapproved chemicals to the water supply; and submit information on the number of connections. *Id.* These requests are little more than what the law on its face requires. Even Tom Adcock testified at trial that the company had no real problem with any of these requests.

Tr. at 1880. Yet rather than simply comply, Alisal hired an attorney to contest the citation and file suit in state court, contending (contrary to established law) that Defendants were entitled to a hearing on the citation before it was issued and claiming that the water at Moss Landing was not drinking water so it was acceptable to add unapproved chemicals to it. Pl. Exh. 100, 101. Alisal's own notice to customers stated that the water could be consumed after boiling. D. Exh. 65. Indeed, the act of boiling water can serve to concentrate chemicals present in the water. Tr. at 1110-11.

The record in this case is replete with evidence of Defendants' acts of intransigence and lack of cooperation with regulators:

- Every one of the citations issued by the State showed repeated, but unavailing, informal efforts to obtain compliance through repeated phone calls and letters that went unanswered. Pl. Exh. 1, 2, 7, 21, 22, 39.

- Rather than use State-approved language in a required notice to customers concerning the November 1992 MCL failure at Alco, the Adcocks sent a letter to Alco users with misleading and false information. Tr. at 157-60.

- Tom Adcock, in response to a request by the State for information concerning the number of service connections at Alco and Toro, delivered fifteen boxes of documents at the State offices and told the State officials to figure it out. Tr. at 394-95.

- Tom Adcock added a non-approved chemical to the water system at Vierra Canyon even though Gene Reade of DHS personally instructed

him not to add the chemical – sodium thiosulfate – and despite the fact that, as Mary Anne Dennis testified, one easily could determine that the substance was not approved for human consumption by looking on the Internet. Tr. at 456-57, 1108-09.

• Tom Adcock wrote a number of letters to Mary Ann Dennis with respect to her request that Alisal not add chemicals to the systems without permission. Pl. Exh. 91, 93, 94. As Ms. Dennis testified, it seemed obvious that she was referring to substances such as the sodium thiosulfate, not regular disinfection after work on the system. Tr. 463-64. Ms. Dennis testified that it was, and remains, typical of Tom Adcock to question the County's directives in this manner. Tr. at 462.

• In October 2000, Tom Adcock told Elizabeth Karis that he would fight the County on its request that Alisal automate the Vierra Canyon system. Pl. Exh. 111.

• During the boil water events at Moss Landing and Vierra Canyon, Alisal failed to include language requested by the County in letters Alisal sent to customers. Tr. at 445-46; 452-54. As a consequence, the letters were misleading and the County was forced to post accurate information on a daily basis at the local post office. *Id.*

• Defendants published an advertisement in September 2000 in the local newspaper which contained several misleading statements about this Court's summary judgment Order, including that the Court did not find that Alco falsified lab reports or hid violations and that the Court's findings suggested paperwork violations. As Tom

Adcock admitted, the company was involved in the drafting of this document. Pl. Exh. 209; Tr. at 1840.

- Even though Carl Chase, a customer of the Langley/Valle Pacifico system, was able to identify for Alisal the amount of chlorine that needed to be kept in the system for the water to be acceptable, Alisal did not maintain this level of chlorine, but allowed its customers to suffer with poor water quality. Tr. at 692. The best an Alco technician could do, Mr. Chase testified, was simply shrug his shoulders. Tr. at 686. Tom Adcock also instructed Mr. Chase not to talk to his technicians. Tr. at 707.

- Defendants' defiant behavior prolonged the Vierra Canyon boil water order for months. Tr. at 919-39. In Mary Ann Dennis's view, the Vierra Canyon contamination event should have been resolved within two months, not the ten months it took. Tr. at 506.

- Even though the County had told Alisal in the early fall what was required for the Vierra Canyon Boil Water Order to be lifted and the chlorination permit to be granted, Tom Adcock continued to write letters asking that the order be lifted when these conditions had not been met. Tr. at 919-39. At the same time, the company failed to communicate with Ms. Hall about what it was doing to resolve the problem. Tr. at 9924.

- Alisal failed to instruct its sampler to take chlorine residual readings at Vierra Canyon even though, as Mary Ann Dennis testified, this issue had repeatedly been raised to the company. Tr. at 501-04.

- The report of the independent engineer concerning the Vierra Canyon contamination event that was requested by the County in October 2000 was not provided until May 2001, despite the fact that it was completed by the engineer in December 2000. Tr. at 926, 937.

- Alco failed to make diligent efforts to communicate to its customers about the status of the boil water orders. The County received complaints from users at Moss Landing that they were not told of the initiation of the boil water order, and from users at Vierra Canyon that they did not know of the lifting of that order. Tr. at 941, 448.

- Regarding San Jerardo, Alisal could have and should have taken a proactive approach to the impending nitrate MCL failure by seeking permission to dig a new well or install treatment. Tr. at 670-73. Rather, Alisal allowed the MCL to be violated, thereby necessitating the provision of bottled water. *Id.*

- Alisal corresponded with regulators and paid bills on behalf of the tiny El Camino Real system for ten years, never hinting that it did not own the system until August 2001, when it learned the MCL for nitrates has been exceeded, at which time it claimed it had no connection to the system. Tr. at 949-52.

The only times that the regulators were able to get timely compliance from Defendants were when threats were made that would have had an immediate impact on Alisal's bottom line. The State was able to get the chemical test results it had been seeking for three years within 72 hours when it threatened to shut down one of Defendants' wells in June 1994. Tr. at 169-70. The State was able to

get information on service connections at Alco in 1995 when it imposed a moratorium on new connections. Tr. at 188-89. With these dramatic exceptions, Defendants' record of cooperation with regulators' legitimate requests is dismal.[7]

E. *Defendants Repeatedly Have Failed to Accept Responsibility for Their Conduct*

Defendants' approach at trial, as it appears to have been for more than ten years, was either to minimize the significance of their own conduct or to blame the situation on the regulators. For example, Patricia Adcock testified that it was Alisal's lawyer, not herself or anyone else connected with the companies, who drafted the letter to Alisal's customers that mischaracterized this Court's summary judgment Order. Tr. at 1457. Yet Defendants admit that they reviewed the advertisement before it was published. Tr. at 1840.

Mrs. Adcock suggested that the County was responsible for Alisal's chronic non-compliance since it did not keep the company adequately appraised of regulatory developments. Of course, it is Alisal that is charged with that responsibility. *Emery Mining Corp. v. Secretary of Labor,* 744 F.2d 1411, 1416 (10th Cir.1984). Notwithstanding that

[7] The duration and extent of Defendants' history of non-compliance leads the Court to conclude that the drastic remedy of a receivership is not only justified but also necessary. There is very little in the record which would suggest that Defendants reasonably could be relied upon to change their entire corporate culture simply because this Court issued an injunction. In fact, Defendants' evident misunderstanding of the significance of this Court's order granting the government's motion for summary judgment very much suggests the opposite.

responsibility, Mrs. Adcock testified that she never read the text of the SDWA or its implementing regulations. Tr. at 1485.

Defendants also suggest that the County was responsible for the fact that the Vierra Canyon boil water order was not lifted for ten months. *See generally* testimony of Tom Adcock. The evidence clearly showed, however, that the system was responsible for the fact that Order extending for as long as it did.

Defendants' theories are not supported by the evidence. Virtually all of the state and county regulatory personnel who testified at trial described how difficult it was to obtain the most basic cooperation from Defendants, how the amount of time they devoted to dealing with problems related to these water companies far exceeded the time they were required to spend overseeing other utilities under their jurisdiction and how defendants typically tended to take matters into their own hands rather than work with regulators. There was no credible evidence that any regulatory agency was overzealous or exceeded its authority in its dealings with Defendants To the contrary, the evidence showed that in virtually every instance, the regulators made extensive efforts to resolve matters informally with Defendants before taking any official action and sought only minimal sanctions when they did take action. Defendants responded with objections and litigation. The federal government became involved only when local regulators concluded after years of frustration that they lacked sufficient resources to obtain compliance. Tr. at 172.

Given an opportunity at trial to reflect on Defendants' past performance, Patricia Adcock neither took responsibility nor expressed any regret for any past conduct. One might have expected her to testify that she ordered a top-to-bottom review of sampling protocols to ensure that such events did not re-occur. No such testimony was forthcoming. Tr. at 1498-1505. To his credit, Thomas Adcock acknowledged that a number of the violations which occurred in the early 1990's were serious in nature and that both the administration and physical infrastructure of defendants' companies require significant modernization. Tr. at 1812-15; 1899-1900. Even he, however, appeared to suggest that Defendants' more recent difficulties at Moss Landing, Vierra Canyon and San Jerardo were the result of unreasonable regulatory demands rather than any serious failing on the part of management. *See generally* Testimony of Tom Adcock. The Court found the evidence as to actual responsibility for these unfortunate events to be compelling and strongly supportive of the government's position.

In short, it is impossible to consider the evidence presented before and at trial and not reach the conclusion that Defendants simply do not appreciate the seriousness of the conduct for which they have been found legally responsible.[8]

[8] One only can speculate as to whether the present proceedings would have been necessary had Defendants directed the hundreds of thousands of dollars they apparently have spent litigating their disputes with regulatory agencies to improving the infrastructure of the water systems.

F. *Defendants Lack Sufficient Managerial Competence to Comply with the Act*

The evidence at trial shows that Defendants lack the managerial resources and expertise to manage effectively the numerous water systems for which they are responsible, especially the smaller ones. By way of example, there was evidence of the following:

- The contamination of virtually all the systems with bacteria at levels that violated the MCL.

- The failure to prevent dangerous cross connections at Moss Landing despite the fact that the company has two certified water system operators. Tr. at 1100-1106.

- The failure of Defendants' testing to show the true condition of the water at Moss Landing and Vierra Canyon. Tr. at 436, 906-07.

- The failure of Tom Adcock to explain either the contamination or the fact that there was chlorine in the water at Moss Landing. Tr. at 439.

- The failure of Tom Adcock to realize the dangers in adding sodium thiosulfate to the water supply at Moss Landing. Tr. at 1109-10.

- The poor conditions at Moss Landing and Vierra Canyon during the boil water orders, including: a frog present in one of the storage tanks at Moss Landing; holes in the roofs of tanks at the Vierra Canyon system; vegetation growing in tank vents; the failure of Tom Adcock, Jr. to know which tanks were in service at Moss Landing, or how to collect a sample from a storage tank. Tr. at 1094-98, 1123; 910-12.

- The pumphouse at Moss Landing overflowed water because of known defects in the system that management did not fix. Tr. at 891-93.

- No one at the company realized that the well head samples from Moss Landing were showing high chlorine residuals and that, therefore, something was clearly wrong with them. Tr. at 1113-1115; Tr. at 902-03.

- Tom Adcock spent weeks using improper methods to disinfect the tanks and wells at Vierra Canyon but failed to close-up the system to prevent additional contaminants from infiltrating or re-contaminating the system. Tr. at 1124-30, 1136-38.

- Alisal's incompetence needlessly prolonged the boil water order at Vierra Canyon. Gene Reade testified that it typically takes 3-4 weeks to resolve a contamination event like the one at Vierra Canyon and that Tom Adcock's failure to disinfect the system properly prolonged the boil water order. Tr. at 506, 1140, 1143.

- Defendants' incompetence also has resulted in the current nitrate problems at the San Jerardo system. Cheryl Hall and Elizabeth Karis both testified that a responsible water purveyor would not have allowed the system to worsen to the point where customers were forced to use bottled water. Rather, a responsible operator would have begun the process of digging a new well once the nitrate concentrations in the water began approaching the MCL. Tr. at 670-73, 946-48.

- Cheryl Hall and Mary Ann Dennis both compared Alisal unfavorably to the other public utilities they oversee in Monterey County. Tr. at 509, 955-56.

- Brian McKeown, the United States' expert, testified that the list of things that need to be done to repair and upgrade the Alisal systems demonstrates a lack of proper operation and maintenance. Tr. at 1038-39.

- Both Brian McKeown and Gene Reade testified to a lack of confidence that Defendants have the managerial competence to prevent future violations. Tr. at 1036, 1062-64; 1140-41, 1143. As Mr. McKeown put it, Alisal does not have the human resources necessary to implement the plan required to attain compliance. Tr. at 1062-64.

The Court found no credible evidence disputing these incidences of managerial incompetence.

G. *Defendants Lack Sufficient Financial Resources to Comply with the Act*

The evidence at trial demonstrates that Defendants lack the financial wherewithal to operate their systems in a manner which will ensure the protection of public health. The evidence is that Alisal needs to invest some $8.3 million over the next five years to bring its systems into full compliance with the law and $750,000 just within the next 12 months. Tr. at 1035, 1058-1060; Pl. Exh. 206, 207A. This is work that is necessary simply to get the water systems into compliance with applicable drinking water regulations. Tr. at 803. As Lynn Putnam of the engineering firm of Black & Veatch, which conducted a

comprehensive audit of Defendants' facilities, testified, all the work her firm recommends needs to be done or future non-compliance will likely result. Tr. at 805-06. Indeed, Ms. Putnam testified that it would not be sound management to ignore the capital improvement program recommended by Black & Veatch. Tr. at 806.

Robert Harris, the government's accounting expert whom the Court found credible, testified that Defendants do not have anything approaching the financial wherewithal to invest the amount of money contemplated by Black & Veatch. Indeed, Alisal as of Dec. 30, 2000, was in the unusual situation of having *negative* working capital, meaning that the companies have little, if any, ability to meet their current financial obligations. Tr. at 1181, 1185-86; Pl. Exh. 180. That negative working capital position is in excess of $3 million. Tr. at 1186. Alisal has approximately $5,000-$6,000 in cash. *Id.* There is no excess money going into the bank. Tr. at 1192-93. The money the company generates in revenues is all accounted for with no money left over for savings. Tr. at 1193. In fact, there is no "extra money" that could be spent on additional projects. Tr. at 1194. Mr. Harris further testified that the company has net annual cash flow of only $54,433. Tr. at 1196. This cash flow, Mr. Harris testified, is insufficient for Alisal to stay current on its obligations given its large working capital deficit. Tr. at 1196. As Mr. Harris testified, there simply is no extra money to make the capital improvements recommended by Black & Veatch. Tr. at 1194.

While certain capital expenditures theoretically could be reimbursed in the future by the through general rate increases approved by the California Public Utility Commission ("PUC"), the fact remains that Alisal will need to borrow substantial funds in the short term to get its

systems up to par. Tr. at 1203. As Patricia Adcock testified in her September 2001 deposition, Alisal's need to borrow money is ongoing, as the PUC sometimes takes as long as two years to approve a general rate increase. Patricia Adcock Depo. (9/7/01) at 119. And as Marino Rodriguez, Alisal's comptroller, testified, the PUC does not approve rate increases until *after* the improvement for which reimbursement is sought has been made. Tr. at 1366.

The inescapable conclusion is that Alisal, in both the immediate and intermediate future, will continue to need to find sources of funding independent of any general rate increase ultimately approved by the PUC. The evidence is that Alisal will not be able to do so. As Patricia Adcock herself testified at her September 2001, deposition, given Alisal's dire financial straits, banks will no longer lend money to the companies. Patricia Adcock Depo. (9/7/01) at 112-13.

Mr. Rodriguez asserted that Alisal can not only pay all its debts, including $3 million owed to plaintiffs in unrelated litigation, but also can fund any needed improvements. This assertion is belied by the evidence, including Mrs. Adcock's deposition testimony that the utilities do not have the money to pay the $3 million judgment, let alone any other debts and cost of improvements, and that Alisal's stock is worthless. Tr. at 1378-79; Patricia Adcock Depo. (9/7/01) at 87-88. The Court also heard uncontroverted evidence from Mr. Harris that neither the Adcocks individually nor the Trusts into which they transferred various assets have sufficient funds to contribute to the necessary capital improvements. Tr. at 1205-07; Pl. Exh. 180.

III. EQUITABLE RELIEF

Defendants note appropriately that the appointment of a receiver is a drastic remedy and that the Court must consider carefully whether a less drastic remedy would be sufficient to protect public health. The Court has considered several alternatives, including not ordering any equitable relief at all. The evidence at trial, however, suggests powerfully that significant equitable relief, including the appointment of a receiver for certain specified purposes, is warranted here.

The Court concludes that to maintain the status quo, that is, to allow Defendants to continue to operate all of the water companies without judicial oversight, would be a total abdication of its judicial responsibility. This is readily apparent in light of the fact that even after numerous citations and orders were issued to defendants by state and local authorities, and even after this Court granted summary judgment with respect to more than 200 violations of the Act, significant violations of the Act continued. Indeed, further serious violations occurred even during trial. The seriousness, duration and willfulness of Defendants' non-compliance with legal requirements are evidence of a corporate culture which simply "doesn't get it," in which both regulations and regulators are seen as an inconvenience rather than a means of protecting the public. Moreover, as noted above, the evidence shows that Defendants lack the managerial resources and expertise to manage effectively the numerous water systems for which they are responsible, especially the smaller ones.

While Defendants argue that the near absence of alleged violations between late 1994 and 1998 shows that Tom Adcock's assumption of day-today management of the

companies has improved greatly the companies' compliance with the law, the protracted boil orders at Vierra Canyon and Moss Landing happened on Tom Adcock's watch. The testimony as to those very recent events reflected many of the same patterns of denial, minimization, blaming others and simply no: getting things done that characterized the tenure of the senior Adcocks. Although it was impressed with Tom Adcock's sincerity and has no doubt that his subjective intent is to do the right thing, the Court concludes that under present circumstances Defendants lack both the managerial and financial wherewithal to operate in a manner which will ensure the protection of public health.

The Court has considered carefully and at length whether it should limit its grant of relief to an injunction requiring Defendants to implement some or all of the recommendations of the Black & Veatch report. While this option is tempting because it would be less drastic and less administratively cumbersome than a receivership, the evidence supports the conclusion that ultimately it would be ineffective. As noted earlier, Defendants clearly lack the financial resources to implement the Black & Veatch recommendations. There was no credible evidence that at any time in the near future they could borrow enough money to fund the recommended improvements or that they could count on regulatory approval of a rate increase to pay back lenders. The smaller water systems in particular suffer from basic, chronic, physical inadequacies, correction of which will require an immediate and significant infusion of funds.

The Court appreciates and respects the decades of hard work the Adcock family has devoted to its water companies. But the Court has the responsibility in this

case of crafting a remedy that is protective of public health, and this responsibility necessarily takes preeminence over all other considerations. Although not binding on this Court, California's expressed public policy regarding small troubled water systems is relevant to the case before the Court. Section 855 of the Cal. Public Utilities Code expressly provides for the appointment of a receiver to run a water utility where the water utility is "unable or unwilling to adequately serve its ratepayers." That clearly is the case here. The Court concludes that some form of receivership is necessary in this case to protect public health and to effectuate the purposes of the SDWA.[9]

At the close of trial, the Court raised *sua sponte* the possibility of a partial divestiture which would permit defendants to continue to operate Alco, their one mid-sized system, while being required to sell the others. The Court believes that there are a number of bases in the record for such a disposition. First, the most severe recent violations have occurred in smaller systems such as Vierra Canyon,

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[9] Also relevant is the testimony of defendants' PUC expert, Carl Danner, who testified that it is the current policy of the PUC to seek to facilitate the sale of small, troubled water systems to larger, more reputable water companies. Tr. at 1337-38; Pl. Exh. 219. That is because, as Mr. Danner testified, the California Legislature has found, as codified at Section 2719 of the Pub. Utility Code, that public water systems are faced with the need to replace or upgrade infrastructure to meet increasingly stringent safe drinking water laws; and because increasing amounts of capital are required to finance the necessary investment in public water system infrastructure; and because economies of scale are achievable in the operation of public water systems. Tr. at 1336-37; Pl. Exh. 218. As Mr Danner further testified, the PUC has recognized that larger companies can bring more resources to bear in emergency situations; have greater management and operational expertise; and have greater access to funding for infrastructure needs than do small troubled systems. Tr. at 1331-33; Pl. Exh. 218.

Moss Landing and San Jerardo. By contrast, the Alco system has operated for the most part without incident since Tom Adcock assumed *de facto* management of the companies. Second, despite the fact that Alco serves many more customers than any of the other systems, the immediate capital improvements recommended by Black & Veatch with respect to Alco are relatively modest; in contrast, the cost of improving small systems such Normco, San Jerardo and Vierra Canyon in each instance is more than double that associated with Alco. *See* Pl. Exh. 207A.[10] Third, to the extent that deficiencies in management are one of the sources of Defendants' continuing inability to meet their legal obligations, it is logical to conclude that managing one mid-sized water company will be easier than trying to manage a far-flung empire of small ones. Finally, such a remedy would be less drastic than the full divestiture requested by the government while at the same time having some realistic prospect of success in ensuring that the public receives safe drinking water.

The Order Appointing Equitable Receiver issued herewith provides for:

> 1. An injunction requiring Defendants to implement the recommendations of the Black & Veatch report with respect to Alco, forthwith as to those items designated by the United States'

[10] The Court acknowledges, as the government points out, that Black & Veatch recommends additional capital improvements to the Alco system which could cost as much as $2.7 million. However, if Defendants prove that they are capable of managing this single system effectively, the prospects of their raising the necessary funds either through financing or rate increases within the time frames recommended by Black & Veatch would appear to be less speculative.

expert, Brian McKeown, as "immediate" needs and within the recommended time frames as to all remaining items;[11]

2. Appointment of a receiver, to be compensated by Defendants, to assume management of all of the water systems with the exception of Alco;

3. An order instructing the receiver to assess the feasibility of selling all of the water systems other than Alco either separately or in combination and to report the results of such assessment to the parties and to the Court;

4. An order instructing the receiver, either personally or with the assistance of a retained expert to be compensated by Defendants, to monitor Defendants' compliance with both the injunction and all applicable laws and regulations and to report the results of such monitoring to the parties and to the Court; and

5. An order reserving the Court's jurisdiction to enter such further orders as are appropriate in the event that some or all of the water systems other than Alco cannot be sold, considering *inter alia* defendants' compliance with the injunction and with their legal obligations generally.

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[11] Defendants argue that PUC approval will be required for some or all of these improvements. As the government correctly notes in its motion to strike Defendants' objections, there is no evidence in the trial record which would enable the Court to assess this argument. Obviously, if regulatory requirements of the PUC or any other agency constrain Defendants' ability to comply with this Court's orders, the Court will take such requirements into account in overseeing Defendants' compliance.

The Court has given serious thought to the government's proposal that the Court order immediate divestiture of all of the water companies. It should be obvious from the foregoing discussion that the Court believes that Defendants' conduct as shown by the evidence fully justifies such a step. The Court nonetheless is constrained by the case law and by general principles of equity to explore the effectiveness of a less drastic remedy. The disposition outlined above addresses immediately the most dysfunctional elements of Defendants' operations, the small water systems, while giving Defendants a clear opportunity to demonstrate that they can operate at least one water system in compliance with the law. Should the disposition prove to be impracticable, either because the smaller systems cannot be sold unless they are "packaged" with Alco or because Defendants cannot or do not comply with the injunction or their legal obligations, the Court retains the ability to order full divestiture, and it will not hesitate to do so should circumstances warrant.

ORDER APPOINTING EQUITABLE RECEIVER

Having conducted a bench trial in the above-entitled matter on December 4-7, 2001, December 18-20, 2001, and January 7-8, 2002, to determine the appropriate relief in this case; having considered the pre-trial and post-trial briefs submitted by the parties as well as Plaintiff's proposed form of order and Defendants' objections thereto; in light of Defendants' lengthy history of failing to provide healthful drinking water in compliance with the Safe Drinking Water Act ("Act"), 42 U.S.C. § 300f et seq. and the clear potential for imminent violations of the Act by the Defendants in the future; because of the failure of less drastic remedies to secure Defendants' compliance with

the Act in the past; in view of the broad range of equitable powers available to this Court to enforce and effectuate its orders and judgments; and good cause therefore appearing, the Court hereby ORDERS that a Receiver be appointed to assume management of the following drinking water systems owned and operated by Defendants (collectively, "The Water Systems"): Toro Water Service, Inc.; Moss Landing Water Service, Inc.; North Monterey County Water Service, Inc.; Blackie Road Water System # 18; San Jerardo Water System; Vierra Canyon Water System; Langley/Valle Pacifico Water System; and Buena Vista Water System. The Defendants shall maintain control of Alco Water Service ("Alco") which, for purposes of this Order, is not considered part of The Water Systems. The Receiver shall, however, have certain monitoring responsibilities with respect to Alco as described below.

The legal and factual basis for this Order is set forth with particularity in the Court's Findings of Fact and Conclusions of Law issued simultaneously herewith.

I. *General Powers, Authorities and Duties of the Receiver*

A. Pending an investigation of the feasibility of selling The Water Systems, the Receiver shall have the following powers, authorities and duties with respect to management of The Water Systems, consistent with applicable laws and regulations, including any requirements of the California Public Utilities Commission (PUC):

1. To pay and collect bills; to incur debt; to hire necessary assistants, consultants, contractors, attorneys and engineering firms; to hire and fire personnel; and to acquire and repair capital equipment.

2. In his or her discretion, to perform all acts deemed necessary to achieve and maintain, as expeditiously as possible, full compliance with the Act and with all other applicable laws and regulations, including but not limited to the following: to sell and convey corporate property as necessary to manage The Water Systems; to impose lawful charges for water service upon customers of all The Water Systems and to collect such charges; to apply to the PUC for rate increases on a temporary and/or permanent basis, as appropriate; and to manage, control, convey, liquidate, and deal with all items, assets, properties, contracts, and other matters incident to his or her responsibilities. Nothing herein, however, authorizes the Receiver to sell any of The Water Systems without further Order of the Court.

3. To have full and complete access to the personnel, books, records, electronic databases and facilities of The Water Systems and to make such items available to any consultants, accountants, attorneys or other such persons employed by the receiver.

4. To consult with personnel of the United States Environmental Protection Agency with respect to any aspect of management, planning, and operation of The Water Systems, and to secure technical advice or assistance from such personnel for the purpose of assuring compliance with the Act and all other applicable laws and regulations.

B. The Receiver shall submit monthly operating reports to this Court and to the parties which reports shall contain all financial information for The Water Systems, including an accounting of any fees drawn by the Receiver, and all receipts, disbursements, debts and claims of the

receivership over the reporting period; as well as all information related to the Receiver's efforts to bring The Water Systems into, and to maintain, compliance with the Act and all other applicable laws and regulations.

C. The Receiver shall promptly mail notice of the general terms of this receivership to all customers of The Water Systems.

In addition to discharging the foregoing duties with respect to The Water Systems, the Receiver, either personally or with the assistance of any retained consultants or experts, also shall monitor Alco's compliance with the requirements of this Order, as set forth below, and with all applicable laws and regulations. The Receiver shall submit monthly operating reports to this Court and to the parties setting forth the results of such monitoring.

The Receiver shall not be personally liable for any act done in compliance with this Order. The Court will defer the question of whether the Receiver should be required to furnish a bond pending a review of the qualifications of the Receiver.

All assets of The Water Systems shall be subject to the receivership. No person may file any action or enforce or create any lien, or cause to be issued, served, or levied any summons, subpoena, attachment, or writ of execution against the Receiver or any property subject to the receivership without first obtaining Court approval upon motion with notice to the Receiver and the Attorney General. Any legal procedure described herein commenced without prior Court approval is void except as to a bona fide purchaser for value and without notice to the receivership. No person without notice of the receivership shall incur any liability

for commencing or maintaining any legal procedure described by this paragraph.

Within three (3) weeks of his or her appointment, the Receiver shall report to the Court and to the parties whether in the Receiver's judgment the receivership as established by this Order is practicable or whether, given the interrelationship between The Water Systems and Alco, or for any other reason, the receivership as established by this Order is ineffectual and/or in need of revision. To the extent the Receiver concludes that the receivership [sic] impracticable, either wholly or in part, the Receiver's report to the Court and to the parties shall set forth the reasons for this conclusion and suggest amendments to this Order addressing the Receiver's concerns.

II. *Specific Powers, Authorities and Duties of the Receiver in Assessing the Feasibility of Selling The Water Systems*

The Receiver shall immediately assess the feasibility of selling The Water Systems and shall have the additional specific powers, authorities and duties in doing so:

A. To determine whether The Water Systems, either separately or in combination, realistically can be sold to a water purveyor with: (1) a demonstrated history of compliance with the Act; and (2) sufficient financial resources to implement the capital improvements and other measures recommended by the engineering firm Black & Veatch in that firm's October, 2001, reports on The Water Systems, a copy of which will be made available to and kept in the possession of the Receiver.

B. To hire any attorneys, or other agents, as reasonably are necessary in the Receiver's judgment to assist

in assessing the feasibility of effecting a sale of The Water Systems, either separately or in combination.

C. To make public, by usual and customary means, the potential availability of The Water Systems for purchase. The Receiver shall inform any person making an inquiry regarding a possible purchase of The Water Systems that the assessment of the feasibility of such a sale is being conducted pursuant to this Order and provide that person with a copy of this Order. The Receiver also shall offer to furnish to all prospective buyers, subject to customary assurances of confidentiality and any applicable laws or regulations, all information and documents relating to The Water Systems customarily provided in a due diligence process except for information or documents that are subject to the attorney-client or work-product privileges. The Receiver shall make available such information to the United States at the same time that such information is made available to any other person.

D. To permit prospective buyers to make inspections of the physical facilities of The Water Systems and to have reasonable access to personnel: to any and all environmental, zoning, and other pennit documents and information; and to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Not later than sixty (60) days after his or her appointment, the Receiver shall file with the Court and the parties a report setting forth the Receiver's findings with respect to the feasibility of accomplishing a sale as required by this Order. To the extent that such report contains information that the Receiver deems confidential, such report shall not be filed in the public docket of the

Court. Such report shall include the name, address, and telephone number of each person who expressed an interest in acquiring The Water Systems and shall describe in detail each contact with each such person.

III. *Requirements Applicable to Alco*

Alco is ordered to comply, and the Receiver shall monitor Alco's compliance, with the following provisions, subject to all applicable laws and regulations, including any requirements of the PUC:

A. Alco shall implement forthwith those items from the Black & Veatch report designated by the government's expert, Brian McKeown, as "immediate" needs and within ninety (90) days shall present to the Receiver a plan for implementation of the remaining items within the time frames recommended by Black & Veatch.

B. Alco is enjoined from making any distributions to shareholders while this Order remains in effect. Alco is further enjoined from making any extraordinary expenditures while this Order remains in effect, including the repayment of debt to shareholders.

IV. *Requirements Applicable to the Adcocks*

A. Robert T. Adcock, Natholyn P. Adcock, Thomas R. Adcock and Lynette Adcock (collectively, "The Adcocks") shall provide the Receiver with access to all records of account, including names, addresses, and amounts owed for water service, records or payment history, and record cards of each customer of each of The Water Systems. The Adcocks further shall provide the Receiver with access to all cash or cash-type assets on hand, all keys, instruments of title, records and pass books of bank accounts, all supplies, all monitoring equipment, and all other equipment or other

items employed in the operation of The Water Systems, including tools and motor vehicles.

B. The Adcocks shall use their best efforts to assist the Receiver in the performance of his or her duties. The Adcocks are hereby enjoined, restrained and prohibited from interfering in any way with the Receiver in the discharge of his duties.

C. The Receiver shall have discretion to determine whether and to what extent the Adcocks are involved in the day-to-day operation of The Water Systems.

D. The Adcocks shall cooperate with and assist the Receiver to the extent necessary and appropriate to permit the Receiver to carry out his or her responsibilities under this Order.

E. The Adcocks shall not acquire any new interest, financial or otherwise, in any "public water system" as that term is defined under the Act, 42 U.S.C. § 300f(4), without the express permission of this Court.

V. *Compensation*

Defendants shall be responsible for compensation of the Receiver and of any and all persons employed by the Receiver in carrying out the provisions of this Order. The amount of compensation shall be fixed by the Court upon written application by the Receiver with notice to the parties. In determining any request for allocation of responsibility for the Receiver's compensation among the several Defendants, the Court will consider *inter alia* any applicable laws or regulations, including any requirements of the PUC.

VI. *Retention of Jurisdiction*

A. This Court retains jurisdiction to enter such further orders as are appropriate in the event that some or all of The Water Systems cannot be sold and as necessary to effectuate the purposes of the Receivership.

B. This Court retains jurisdiction to enable any party subject to this Order to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Order, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

VII. *Expiration of Order*

This Order shall expire upon the termination of the Receivership created hereunder, or two years from the date of this Order, whichever is sooner, unless the Order is extended by the Court.

114 F.Supp.2d 927

United States District Court,
N.D. California,
San Jose Division.
UNITED STATES of America, Plaintiff,
v.
ALISAL WATER CORPORATION, et al.,
Defendants.
No. C-97-20099-JF (EAI).

Sept. 15, 2000.

Karen Dworkin, Lori Jonas, U.S. Department of Justice, Washington, DC, for plaintiff.

Stephan Barber, Ropers, Majeski, Kohn & Bentley, San Jose, CA, for defendants.

ORDER[1] GRANTING PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

FOGEL, District Judge.

On October 12, 1999, the Court heard argument regarding three motions for partial summary judgment brought by Plaintiff. All three motions will be granted for the reasons set forth below.

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[1] The original version of this order was issued on August 23, 2000, at which time it was labeled "Not For Publication." The instant order is identical to the original order except that the instant order is designated for publication and corrects typographical errors contained in the original order.

I. BACKGROUND

In this civil action Plaintiff asserts that Defendant public water systems have committed numerous violations of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f *et seq.*, and the regulations implemented thereunder. Defendant Alisal Water Corporation owns and operates eight public water systems in the Salinas, California area: Alco Water Service, Blackie Road Water System # 18, Pine Canyon Division of Alco Water Service, Wildwood Water System, San Jerardo Water System, Vierra Canyon Water System, Vierra Estates Water System, and Langley/Valle Pacifico Water System. Defendant Toro Water Service owns and operates a public water system of the same name in the Salinas area. Defendant Moss Landing Harbor District, a subsidiary of Alisal Water Corporation, owns and operates the Moss Landing public water system. Defendant North Monterey County Water Service, Inc. ("NORMCO"), a subsidiary of Alisal Water Corporation, operates NORMCO public water system. All of these corporations and public water systems are owned, operated or controlled by two individuals, Robert Adcock and his wife Natholyn Adcock, both of whom are named as defendants in this action. Plaintiff seeks prospective injunctive relief, an assessment of substantial civil penalties and recovery of costs.

Overview Of The SDWA

The SDWA requires that the Administrator of the United States Environmental Protection Agency ("EPA") promulgate national primary drinking water regulations addressing contaminants in drinking water provided through public water systems. The Administrator may grant to a state primary enforcement responsibility over

public water systems so long as the state adopts and enforces drinking water regulations which are at least as stringent as the national primary drinking water regulations promulgated by the Administrator. The Administrator may bring a civil action for violation of any applicable requirement of the SDWA if requested by the state agency which has jurisdiction over compliance with national primary drinking water regulations or state drinking water regulations.

One set of regulations promulgated under the SDWA addresses levels of total coliform, an indicator of disease-causing organisms. These regulations, commonly known as the "Total Coliform Rule" or "TCR," set forth requirements for the maximum contaminant level ("MCL"), sampling, monitoring, reporting and record keeping.

Another set of regulations promulgated under the SDWA addresses levels of lead and copper. These regulations, commonly known as the Lead and Copper Rule, set maximum contaminant level goals ("MCLGs") for lead and copper and requirements for monitoring and evaluation of lead and copper levels.

In California, the State Department of Health Services ("DHS") is the agency with primary enforcement responsibility with respect to public water systems. The DHS in turn has agreements with local primary agencies ("LPAs") under which the LPAs enforce the SDWA as to certain public water systems. One such LPA, the Monterey County Health Department ("MCHD"), has primary enforcement responsibility with respect to some of the water systems at issue in this action while the DHS retains primary enforcement responsibility with respect to others.

Investigation Of Defendants

In December 1992 and thereafter, the DHS noticed discrepancies in reports submitted by some of the public water systems operated by Defendants. The DHS investigated, and concluded that the systems were not complying with testing requirements and in some cases were altering documents relating to test results for total coliforms. During the course of its investigation, the DHS concluded that some of the documents had been altered by the laboratory which performed the systems' testing, American Analytical Laboratories ("the Lab"). The Lab was owned by Robert Adcock and managed by his daughter Lynette. The DHS concluded that there was a conflict of interest because the Adcocks' water systems had too much control over the manner in which their samples were handled and reported. The DHS ultimately issued an order mandating that all water quality control analysis for all systems owned by the Adcocks be performed by an independent laboratory.

In June 1994, the DHS requested that the EPA investigate the public water systems owned and operated by the Adcocks. On October 3, 1994, Magistrate Judge Patricia Trumbull granted the EPA's application for warrants to search the offices of Alco, Toro and the Lab. The warrants were executed on October 4, 1994, at which time a number of documents were seized. The seized documents were Bates-stamped by Special Agent Elizabeth Domagalski of the EPA, who also prepared an index showing which documents were found in which location. Additional documents subsequently were subpoenaed by a grand jury.

Review of the seized documents demonstrated inconsistencies. For example, worksheets and reports found at the Lab indicated positive test results for total coliform as to certain samples. However, reports found in the water systems' files indicated negative test results for the very same samples. Moreover, the seized documents indicated that the water systems commonly took many more samples than required and selected only negative samples for submission to the DHS or MCHD.

On August 15, 1996, the DHS sent a letter to the EPA requesting that the EPA bring civil and/or criminal action for violation of the SDWA against the Adcocks and all public water systems associated with them. Plaintiff filed this action on January 30, 1997. The operative second amended complaint asserts causes of action for: (1) failure of M.C.L. § for microbiological contaminants; (2) failure to notify state or county of failure of MCL; (3) failure to give public notice of failure of MCL; (4) failure to do repeat and increased routine monitoring; (5) failure to notify state or county of failure to do repeat or increased routine monitoring; (6) failure to report test results; (7) failure to sample according to written site sample plan; (8) failure to keep records; (9) failure to monitor for lead and copper; and (10) fraudulent conveyance.

Motions For Partial Summary Judgment

Plaintiff has filed three separate motions for partial summary judgment. The first motion seeks adjudication of the corporate defendants' liability with respect to the first eight causes of action. The second motion seeks adjudication of the corporate defendants' liability with respect to the ninth cause of action. The third motion seeks

adjudication that Robert and Patricia Adcock are personally liable for the violations of the SDWA set forth in the first nine causes of action. Defendants oppose all three motions.

II. LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of informing the Court of the basis for the motion, and identifying the portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

If the moving party meets its initial burden, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. A genuine issue for trial exists if the non-moving party presents evidence from which a reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the material issue in his or her favor. *See Anderson*, 477 U.S. 242, 248-49, 106 S.Ct. 2505; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir.1991).

III. DISCUSSION

A. Motion Re First Eight Causes Of Action (Microbiological Contaminants)

The first eight causes of action allege that Defendant water systems violated national primary drinking water regulations regarding microbiological contaminants. Plaintiff seeks partial summary judgment with respect to these asserted violations.[2] The Court concludes that Plaintiff has submitted ample evidence of the asserted violations. This evidence includes numerous documents obtained from the Lab, the files of Defendant water systems and the files of the DHS and the MCHD. Examination of the documents reveals significant discrepancies between the test results documented by the Lab on the one hand and the test results recorded and reported by Defendants on the other hand. The documents also indicate that Defendant water systems knew they had microbiological contaminant levels exceeding the MCL, failed to report or give the public notice of such contaminant levels, failed to

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[2] These asserted violations involve ten different regulations enacted under the SDWA: 40 C.F.R. § 141.21(a), requiring that total coliform samples be taken pursuant to a written sample site plan; § 141.21(b)(1), requiring repeat sampling in the event that a routine sample tests positive for coliform; § 141.21(b)(5), setting requirements for routine sampling; § 141.21(g)(1), imposing reporting requirements upon public water systems which exceeds the M.C.L. § total coliform; § 141.21(g)(2), requiring a public water system to report monitoring violations; § 141.31(a), setting reporting requirements; § 141.32(a), imposing notification requirements upon owners and operators of public water systems which fail [sic] comply with an applicable M.C.L. § or other requirement; § 141.32(b), imposing notification requirements upon owners and operators of public water systems which fail to perform required monitoring; § 141.33(a), imposing record-keeping requirements upon owners and operators of public water systems; and § 141.63, setting MCLs for microbiological contaminants.

do repeat and increased routine monitoring as required, failed to report the lack of such repeat and increased routine monitoring, failed accurately to report test results, failed to sample in the manner required and failed to keep records in the manner required.

Defendants do not dispute the existence of the discrepancies documented by Plaintiff. Rather, Defendants contend that: (1) Plaintiff lacks standing to bring this action; (2) much of the documentary evidence submitted by Plaintiff is inadmissible; (3) most of the alleged violations are based upon an incorrect assumption that the positive coliform samples were routine samples; (4) Defendants collected water samples in conformance with a site sampling plan as required by applicable regulations; (5) Plaintiff is estopped from asserting the violations; and (6) Plaintiff is selectively enforcing the law. All of these arguments are without merit.

(1) Standing

Defendants contend that the United States lacks standing to bring this lawsuit. However, standing is conferred pursuant to 42 U.S.C. § 300g-3(b), which reads in its entirety as follows:

> (b) Judicial determination in appropriate Federal district courts; civil penalties; separate violations
>
> **The Administrator may bring a civil action in the appropriate United States district court** to require compliance with any applicable requirement, with an order issued under subsection (g) of this section, or with any schedule or other requirement imposed pursuant to a variance

> or exemption granted under section 300g-4 or 300g-5 of this title if –
>
> (1) authorized under paragraph (1) or (2) of subsection (a) of this section, **or**
>
> (2) **if requested by** (A) the chief executive officer of the State in which is located the public water system which is not in compliance with such regulation or requirement, or (B) **the agency of such State which has jurisdiction over compliance by public water systems in the State with national primary drinking** water regulations or State drinking water regulations.
>
> The court may enter, in an action brought under this subsection, such judgment as protection of public health may require, taking into consideration the time necessary to comply and the availability of alternative water supplies; and, if the court determines that there has been a violation of the regulation or schedule or other requirement with respect to which the action was brought, the court may, taking into account the seriousness of the violation, the population at risk, and other appropriate factors, impose on the violator a civil penalty of not to exceed $25,000 for each day in which such violation occurs.

42 U.S.C. § 300g-3(b) (emphasis added). In the present case, the appropriate agency (the DHS) sent a letter to the EPA dated August 15, 1996, formally requesting that the EPA file civil and/or criminal suit against the Adcocks and their water systems for violation of the SDWA. (August 15, 1996 Letter of David Spath) Accordingly, the United States has standing to bring this action pursuant to subsection (b)(2).

Defendants contend that the Spath letter of August 15 was not sufficiently specific to confer standing on the United States. According to Defendants, a request from a state agency to the EPA must detail the specific regulations violated. No such requirement appears in the SDWA itself. Nor has the Court been able to discover any case law imposing such a requirement. In the absence of any authority to the contrary, the Court concludes that the plain statutory language means just what it says – the EPA may bring action if requested by the appropriate state agency. The EPA was so requested.

Defendants also contend that the EPA lacks standing unless it can show that the requirements of both subsection (b)(1) *and* subsection (b)(2) were met. Subsection (b)(1) refers to statutory language providing for notice to water systems of violations and offers of advice and technical assistance to bring such water systems into compliance. Defendants contend that because the requisite notice of violations and offers of assistance were not given, the EPA lacks standing to pursue this suit. Defendants are mistaken. The statute clearly confers standing upon the EPA provided that the requirements of subsection (b)(1) *or* subsection (b)(2) are met. The requirements of subsection (b)(2) were met, as discussed above.

(2) Admissibility Of Evidence

Defendants object to the admission of documents seized at the Lab. Those documents are authenticated through the declaration of Elizabeth Domagalski, the EPA agent in charge of the search. Ms. Domagalski Bates-stamped the documents and kept the chain of custody. Defendants concede that Ms. Domagalski is competent to

testify that the documents submitted are the documents seized at the Lab, but contend that the documents are inadmissible under the hearsay rule.

The Court concludes that the documents are admissible. Defendants authorized the Lab to test samples and send results directly to appropriate government agencies. Accordingly, the documents appear to constitute admissions of an agent under Federal Rule of Evidence 801(d)(2)(C) and (D).

Additionally, the documents are admissible as business records under Federal Rule of Evidence 803(6). There can be no real dispute that the documents were kept in the ordinary course of the Lab's business. Defendants argue that the documents are inadmissible because they are "untrustworthy." Under Rule 803(6), the business records exception to the hearsay rule does not apply if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R.Evid. 803(6). Defendants introduce statements from Lab employees indicating that mistakes often were made on reports. If this happened, the employee would re-do the report and place the first, erroneous version of the report in a recycle bin. Defendants' theory is that a number of the documents seized from the Lab were these first version reports. However, Plaintiff introduces evidence that the alleged violations occurred eight months to three years prior to the date upon which the Lab documents were seized. There is no evidence that discarded reports stayed in the recycle bins for that length of time. Finally, there is no evidence that Lab worksheets, upon which the final reports were based, ever were re-done in the same manner as the reports. The Lab worksheets provide the information necessary to prove the alleged violations.

(3) Positive Coliform Samples

Defendants contend that a number [sic] Plaintiff's claims are based upon an assumption that the samples in question were routine samples. Defendants contend that Plaintiff has not proved this assumption and that triable issues of material fact exist as to whether the samples in question were routine samples.

Plaintiff contends that there *is* evidence that the samples in question were routine samples. Octavio Castillo, a sampler for Alisal, testified that when a sample was special rather than routine the sample was so labeled. Additionally, the 30(b)(6) deponent for the Lab testified that when a sample was special that information was indicated on the final report. Not one of the samples referenced by Plaintiff is labeled "special."

Plaintiff further argues that to the extent any uncertainty exists regarding the purpose of particular samples, this uncertainty was caused by Defendants' failure to keep records in the manner required by applicable regulations. Plaintiff contends that Defendants should not be permitted to use its own sloppy record-keeping practices to shield itself from liability for failing to report positive samples and failing to do repeat testing.

The Court concludes that Plaintiff's showing is sufficient to meet its burden of demonstrating that the samples in question were routine and that Defendants have failed to create a triable issue as to this material fact. Defendants point to the testimony of Patricia Adcock, who states that a number of the samples at issue were special. However, when Ms. Adcock was pressed it became clear that she had no independent recollection and no documentation regarding the purpose of the samples. Rather, she

testified that the samples in question must have been special, because if they had been routine they would have been reported to the appropriate agency. Given that the very thrust of Plaintiff's claims is that Defendants failed to report routine samples, this kind of circular reasoning is hardly sufficient to create a triable issue of fact.[3]

(4) Site Sampling Plan Requirement

"Public water systems must collect total coliform samples at sites which are representative of water throughout the distribution system according to a written sample siting plan." 40 C.F.R. § 141.21(a). It is undisputed that the Defendant water systems covered by this regulation concede that prior to 1994 they had only maps. Furthermore, it is undisputed that the Lab was told that it could take samples "from any location listed on the map." This evidence is sufficient to demonstrate that Defendants did not have a written plan ensuring that representative samples would be taken from throughout the system.

Defendants contend that their maps were sufficient to meet the site sampling plan requirement. There does not appear to be any case law on this issue. Accordingly, the Court treats the issue as one of first impression. The Court concludes that Defendants' maps are insufficient to meet the sampling site plan requirement as a matter of statutory construction. The regulation clearly specifies the requirement that the water system utilize a "plan" dictating the collection of samples such that the samples "are

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[3] As Plaintiff puts it, Ms. Adcock's statement is akin to a taxpayer telling the IRS that certain monies could not have been "income" because she did not pay taxes on them.

representative of water throughout the distribution system." Simply providing the sampler with a map of the system with instructions to sample from any location on the map is insufficient, as a matter of law, to meet this requirement.

(5) Estoppel

A party asserting estoppel against the United States must show that the United States engaged in "affirmative misconduct" and that the party reasonably relied upon the United States' conduct to its detriment. *See Santamaria-Ames v. INS*, 104 F.3d 1127, 1133 (9th Cir.1996).

Defendants make a number of estoppel arguments. First, Defendants contend that Plaintiff is estopped from asserting liability based upon a failure to comply with the Total Coliform Rule ("TCR") because the DHS and MCHD misled Defendants into believing that there would be a delay in enforcing the TCR in California. For example, Mrs. Adcock states in her declaration that Adelio Quiogue of the DHS told her that (1) the DHS would enforce the TCR only after California adopted the rule and (2) water systems would be told when the TCR was adopted. Mrs. Adcock also states that she was confused by letters from state agencies[4] dated December 20, 1990, February 3, 1992 and July 6, 1992. Defendants contend that based upon these communications they could not tell what their obligations were with respect to the TCR.

[4] Plaintiff appears to concede that the state agencies may be considered agents of the United States for purposes of estoppel analysis.

This contention is without merit. The violations asserted by Plaintiff occurred between August 1991 and February 1994. The thrust of Defendants' argument is that the above comments and correspondence left them "confused" as to their responsibilities during the relevant time frame. The Court agrees that the statements at issue were not models of clarity but concludes as a matter of law that confusing statements do not rise to the level of affirmative misconduct necessary to assert an estoppel defense against the United States. Moreover, Plaintiff introduces evidence that the TCR was highly publicized in the industry during 1988, 1989 and 1990, and that numerous workshops were offered in California during this period. In this atmosphere, Defendants' failure to seek clarification of any "confusion" they may have had was unreasonable as a matter of law.[5]

Defendants also argue that stage [sic] agencies repeatedly told Mrs. Adcock that when a sample tested positive for coliform, the proper procedure was to chlorinate or take other corrective action and then take a repeat sample. Mrs. Adcock allegedly was told that if the repeat sample tested negative no other action was required. Mrs. Adcock does not say when these conversations took place. Defendants cannot assert an estoppel defense based upon such

[5] The Court notes that Mrs. Adcock failed to state when her conversation with Mr. Quiogue occurred. Defendants cannot assert an estoppel defense based [sic] Mr. Quiogue's statements without demonstrating that those statements were made before the asserted violations. Moreover, the Court finds that the correspondence referenced by Defendants made crystal clear that the state TCR requirements were effective as of July 1992. A number of the asserted violations occurred after July 1992. Thus the estoppel defense cannot be asserted with respect to these violations even if it could be asserted with respect to earlier violations.

conversations without demonstrating that those conversations occurred before the asserted violations.

Finally, Defendants raised an estoppel argument based upon alleged misrepresentations regarding special samples. These alleged misrepresentations are irrelevant to the violations asserted by Plaintiff, which do not involve special samples.

(6) Selective Enforcement

In the Ninth Circuit, a selective prosecution defense requires a showing that (1) others generally are not prosecuted for the same conduct and (2) the decision to prosecute this defendant was based upon impermissible grounds such as race, religion or exercise of constitutional rights. *See Church of Scientology v. Commissioner of Internal Revenue*, 823 F.2d 1310, 1321 (9th Cir.1987). Defendants have not indicated how race, religion or the exercise of constitutional rights is implicated in this case.[6]

B. Motion Re Ninth Cause Of Action (Lead And Copper)

The ninth cause of action asserts that Defendants violated regulations regarding lead and copper content. The Court concludes that Plaintiff has introduced documentary evidence sufficient to demonstrate that Defendants did

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[6] Defendants cite a Second Circuit case which holds that a selective prosecution defense may be asserted if the prosecution was motivated by "a malicious or bad faith intent to injure the person." *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir.1995). Defendant has not cited, and this Court has not discovered, any Ninth Circuit decisions adopting this test.

violate these regulations. Moreover, Defendants admit to violating the regulations. However, Defendants argue that (1) Plaintiff lacks standing to bring this suit, (2) Plaintiff is selectively enforcing the SDWA against Defendants and (3) Plaintiff is estopped from enforcing the SDWA against Defendants. These arguments are without merit.

(1) Standing

As is discussed above in section III.A.(1), the August 15, 1996 letter of David Spath was sufficient to confer standing upon the United States to bring this action. Defendants contend that the letter was not sufficient to confer standing to bring suit as to the asserted lead and copper violations, because those asserted violations were not at issue when the letter was written.

Defendants appear to be arguing that even if the Spath letter was sufficient to confer standing upon Plaintiff to sue for violations discovered before the writing of the letter, Plaintiff was required to obtain a second letter to confer standing to sue for violations discovered after the writing of the letter. This argument defies reason and logic. It appears self-evident that once Plaintiff began litigating against Defendants, Plaintiff had the obligation to assert all known violations of the SDWA, not just those discovered prior to the letter request. Defendants have not cited, and this Court has not discovered, any authority to the contrary. Accordingly, the Court concludes that Plaintiff has standing to assert lead and copper violations against Defendants.

(2) Selective Enforcement

As is discussed above in section III.A.(6), Defendants fail to address an essential element of a selective enforcement defense.

(3) Estoppel

Defendants contend that the MCHD did not notify them of their obligations to do lead and copper sampling until 1998. Defendants refer the Court to a letter from the MCHD dated June 22, 1998. However, this letter states merely that the California lead and copper rule took effect in December 1995 and that prior to that time the EPA had been responsible for lead and copper enforcement. Nothing in the letter suggests that the MCHD had excused Defendants from their obligations to comply with federal requirements. Nor have Defendants introduced other evidence demonstrating any affirmative act on the part of state or federal agencies which reasonably could have been construed as excusing Defendants from compliance with federal requirements.

C. Motion Re Individual Liability Of Robert And Patricia Adcock

The SDWA provides that the Court may enter "such judgment as protection of public health may require." 42 U.S.C. § 300g-3(b). The SDWA further provides that if the Court determines that there has been a violation of a regulation or other requirement the Court may impose on the "violator" a civil penalty of up to $25,000 per day in

which such violation occurs.[7] *Id.* Plaintiff requests that the Court hold Robert and Patricia Adcock individually liable for the violations of the SDWA discussed above. Defendants contend that neither the statutory language nor applicable case law establishes a basis for holding them individually liable.

The SDWA does not define the term "violator" and there are no reported cases interpreting this term. Accordingly, this Court must decide as a matter of first impression whether the Adcocks may be held individually liable for violations of the SDWA.

Plaintiff has established violations of ten different regulations. These regulations use varying language when indicating the persons or entities toward whom the regulations are directed. For example, one regulation imposes requirements upon "the supplier of water." 40 C.F.R. § 141.31(a). Several others impose requirements upon the "owner or operator" of the public water system. 40 C.F.R. §§ 141.32(a), 141.32(b), 141.33(a). The remaining regulations mention only the "public water system." 40 C.F.R. §§ 141.21(a), 141.21(b)(1), 141.21(b)(5), 141.21(g)(1), 141.21(g)(2), 141.63.

Turning to the first of these categories, the SDWA defines the term "supplier of water" to mean "any person who owns or operates a public water system." 42 U.S.C. § 300f(5). Accordingly, the regulation directed toward "the supplier of water" may be considered to be part of the second category of regulations, directed toward the "owner

[7] The $25,000 figure contained in the text of the SDWA applies to violations occurring through January 30, 1997. Subsequently enacted regulations have increased the maximum penalty to $27,500 for violations occurring after January 30, 1997. 40 C.F.R. §§ 19.2, 19.4.

or operator" of the public water system. With respect to the third category of regulations, the SDWA defines a "public water system" to mean "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances. . . ." 42 U.S.C. § 300f(4). Read literally, then, the third category of regulations imposes obligations only upon the physical pipes and tanks which make up the public water systems. Obviously, such a reading could not have been intended. The only logical interpretation of the regulations is that they are directed toward the persons or entities in charge of the public water systems, i.e., the owners or operators of said systems. Consequently, the Court reads all of the regulations at issue as being directed toward the owners or operators of the public water systems.

Although the phrase "owner or operator" is used in several regulations promulgated under the SDWA, neither the regulations nor the act itself defines this phrase. In this the SDWA is similar to another environmental statute, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). CERCLA imposes liability upon "any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(2). However, as the United States Supreme Court has recognized, "[t]he phrase 'owner or operator' is defined only by tautology . . . as 'any person owning or operating' a facility." *United States v. Bestfoods*, 524 U.S. 51, 56, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998). The Supreme Court therefore was forced to construe the phrase "owner or operator" according to the rules of statutory construction. Giving the word "operating" its ordinary and natural meaning, the Court concluded that an "operator" is "simply someone who

directs the workings of, manages, or conducts the affairs of a facility." *Id.* at 66, 118 S.Ct. 1876. The Court further concluded that as used in CERCLA, the operator "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67, 118 S.Ct. 1876.

Applying the same type of plain language construction in the present case, the Court concludes that an "operator" is someone who directs the workings of, manages or conducts the affairs of a public water system which are specifically related to obligations imposed by the SDWA and the regulations promulgated thereunder.[8] The United States introduces substantial evidence demonstrating that Robert and Patricia Adcock meet this definition. The Adcocks were officers, directors and majority shareholders of the corporations which actually owned the water systems. Mrs. Adcock stated in her deposition that she, her husband and her son constituted the "management" of these corporations and that they were involved in hiring and firing decisions. Mr. Adcock "had overall management responsibility," including meeting with engineers and consultants and handling the companies' finances. Mr. Adcock also attended training regarding the total coliform rule. Mrs. Adcock was in charge of dealing with the DHS and the MCHD, handling correspondence with these agencies and personally typing some Monthly Summary

[8] There is no dispute that the corporate defendants rather than the Adcocks are the "owners" of the public water systems. Accordingly, the question before the Court is whether the Adcocks are "operators" such that they may be held individually liable for the violations in question.

Reports sent to the DHS. Additionally, she was involved in arranging water sampling during 1991-1997, she was listed as the contact person at the Lab, and she was the person informed of any positive coliform reports. In fact, Mrs. Adcock was designated as one of the corporations' 30(b)(6) witnesses in this litigation.

This evidence is sufficient to meet Plaintiff's initial burden of demonstrating that Robert and Patricia Adcock were operators of the public water systems. The burden thus shifts to the Adcocks to present evidence demonstrating that they were not operators of the water systems. Defendants do not even attempt to controvert Plaintiff's showing regarding the extent to which the Adcocks personally were involved in the day-to-day management and operations of the public water systems. Instead, Defendants argue that: (1) Plaintiff lacks standing to bring this motion; (2) the SDWA cannot be construed to impose liability upon the Adcocks; (3) the underlying violations are disputed; and (4) Plaintiff is selectively enforcing the SDWA against Defendants.

Defendants' arguments regarding standing and selective enforcement are disposed of in sections III.A.(1) and III.A.(6), above. Moreover, the underlying violations have been established. The Court therefore will address only the argument regarding construction of the SDWA.

Defendants contend that if any liability attaches, it attaches only to the corporations which own and operate the water systems and that nothing in the SDWA permits imposition of vicarious liability on the individual principals of the corporations. Defendants appear to be arguing that Plaintiff should not be permitted to pierce the corporate veil. The veil may be pierced – that is, a shareholder

may be held liable – when the corporate form is being misused to accomplish wrongful purposes on the shareholder's behalf. *See Bestfoods*, 524 U.S. at 62, 118 S.Ct. 1876. However, Plaintiff does not seek to pierce the corporate veil in this case. Rather, Plaintiff seeks to hold Robert and Patricia Adcock directly liable for their personal conduct in concealing and falsifying positive coliform results and committing other violations of applicable regulations. As the Supreme Court said when discussing operator liability under CERCLA,

> Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. This is so regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice.

Id. at 65, 118 S.Ct. 1876 (internal citation omitted). The plain language of the SDWA likewise makes clear that Congress intended to impose liability on the "violator" of the statute – that is, the person or entity directly responsible for violating the applicable statutory provisions and regulations. Nothing in the SDWA or in cases interpreting environmental statutes suggests that Congress intended persons directly responsible for violations to be shielded from liability because they were employed by or acting on behalf of the corporation which actually owned the water system. Accordingly, while the Court agrees that Plaintiff has not introduced evidence sufficient to hold the Adcocks liable solely on the basis of their status as shareholders in the defendant corporations, the Court concludes that Plaintiff has introduced evidence sufficient to hold the Adcocks liable on the basis of their personal conduct which

directly violated the regulations at issue. The Court therefore will grant the motion for partial summary judgment against Robert and Patricia Adcock individually.

D. Further Proceedings

The Court's rulings on Plaintiff's motions disposes of much of the case. However, several issues remain for resolution, including the amount of civil penalties to be imposed against Defendants and the manner in which the parties shall proceed regarding the remaining claim for fraudulent conveyance. Accordingly, the Court will set a case management conference for 10:30 a.m. on Tuesday, October 10, 2000.

IV. ORDER

IT IS HEREBY ORDERED:

(1) Plaintiffs' motions for partial summary judgment are GRANTED;[9]

(2) The parties shall appear for a case management conference at 10:30 a.m. on Tuesday, October 10, 2000.

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[9] Defendants include a footnote in one of their briefs, asserting an intent to bring a constitutional challenge to the SDWA at some future date. Defendants' intent to take action in the future does not preclude this Court from granting Plaintiff's motions for partial summary judgment now. Those motions were duly noticed, fully briefed and fully argued at a hearing on October 12, 1999.